84-1016

Office Supreme Court, U.S.
FILED
DEC 21 1984
ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1984

JOHN J. HARRINGTON, JR.,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHULA & MAY
BY ALAN M. MAY &
KEVIN E. ROBINSON
518 South Broadway
Santa Ana, CA 92701
(714) 558-0921
and
ROGER S. HANSON
1517 East 4th Street
Santa Ana, CA 92701
(714) 953-0638
Member of the Bar,
U.S. Supreme Court
Attorneys for Petitioner

J. GALLAGHER—Printed Briefs (714) 685-3637

97PP

QUESTIONS PRESENTED

1. Whether the procuring and execution of a search warrant by Customs Agents exceeding their jurisdiction in violation of the statute withdrawing such jurisdiction requires suppression of the evidence seized.

2. Whether the Defendant loses standing to traverse the affidavit for a search warrant for his residence, executed while he was personally present, when the material misstatements of fact, without which the warrant would not issue, are contained in attached and incorporated documents which the Defendant does not have independent standing to challenge, and whether the District and Circuit Courts applied the wrong standard to attack a search warrant for falsity or omission, failing to adhere to **Franks v. Delaware** (1978) 438 U.S. 154.

3. Whether the government's conduct with regard to a Co-Defendant turned sole percipient prosecution witness after the Indictment and Motions, constituted outrageous Government conduct and denied the Defendant due process, by (a) contacting the Co-Defendant to have him testify against Defendant without going through Counsel of Record; (b) bribing the witness by releasing to him Twenty Thousand Dollars ($20,000.00) in funds confiscated from another Co-Defendant; and (c) not notifying the Defendant of the statement and proposed testimony of Co-Defendant for over a year, both having been represented for six (6) months by the same Counsel after the indictment.

4. Whether the Defendant was denied due process by being prosecuted on a single count conspiracy indictment [as to him], and the proof at trial being multiple conspiracies, three in all, two of which evidence was offered against the Defendant, but did not involve him, and the third [middle] one in which there was some evidence of his involvement but was not described in any of the overt acts charged.

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned Petitioner certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable justices of the court to evaluate possible disqualifications or recusal.

There are no other interested parties other than those named in the caption of this case and their attorneys of record.

By _____
Alan M. May
Attorney for Petitioner

TOPICAL INDEX

Questions Presented. i

Certification As To Interested Parties ii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved. 2

Law Enforcement In Illicit Drug Activities. 4

Statement of The Case. 5

Argument I

The Supreme Court Should Grant Certiorari To Establish The Rule Of Law Regarding The Suppression Of Evidence Seized By An Agency In Excess Of Its Jurisdiction In An Area Of Enforcement Specifically Withdrawn By Statute From That Agency: And To Settle The Disparity Among The Circuit Courts Of Appeal As To Whether Suppression Of Evidence Seized By An Unauthorized Officer Should Ever be Granted Absent A Violation Of A Constitutional Right 9

Argument II

The Supreme Court Should Grant Certiorari Since The District Court And Court Of Appeals Ruled In Manner Contrary To The Established Law And

Decisions Of This Court By Denying Defendant Standing To Traverse The Affidavit For The Search Warrant Of His Residence, Which Was Executed While He Was Present, Because The Portions To Be Traversed Were Contained In Documents Attached And Incorporated By Reference, And The Defendant Had No Independent Standing To Attach Those Documents Apart... 22

Argument III

The Court Should Grant Certiorari In Order To Determine When The Totality Of The Prosecutorial Misconduct With Its Cumulative Effect Constitutes A Violation Of Petitioner's Fifth Amendment Due Process Rights And Triggers The Court's Supervisory Function..... 31

Argument IV

The District Court's Ruling, And Its Sanction By The Court Of Appeals, That A Multiple Conspiracy Does Not Exist, But Rather A Single One, When There Were Three Separate Schemes With Different Actors For The Most Part, Because A Common "Core" Group Were Common To All Three, Directly Conflicts With The Applicable Decisions Of This Court..... 34

Conclusion..... 38

Statement Of Related Cases..... 39

Appendix 40

Order From United States Court Of Appeals For The Ninth Circuit, Filed October 22, 1984 41

Order From The United States District Court For The Eastern District Of California, Lodged April 5, 1983 42

Order From The United States District Court For The Eastern District Of California, Filed August 3, 1981 45

Memorandum And Order From The United States District Court For The Eastern District Of California Filed October 23, 1981 54

Opinion From The United States Court Of Appeals For The Ninth Circuit, Filed July 15, 1982 72

Order From The United States Court Of Appeals For The Ninth Circuit, Filed September 7, 1982 ... 79

Order From The United States District Court For The Eastern District Of California, Lodged December 10, 1982 80

Substitution Of Attorney From The United States District Court, Eastern District Of California, Lodged December 18, 1982 82

Memorandum From The United States Court Of Appeals For The Ninth Circuit, Filed August 9 1984 84

TABLE OF AUTHORITIES

Cases	Page(s)
Clay v. U.S. (1957) 0246 F.2d 298, (cert. den.), 355 U.S.863	24
Franks v. Delaware (1978(438 U.S. 154	18, 22, 24, 27
Kotteakos v. United States (1974) 38 U.S. 750	34
Payton v. New York (1980) 445 U.S. 573	10
U.S. v. Anderson (9th Cir.) 453 F. 2d 174	24
U.S. v. Brooks (1962) 303 F. 2d 851, (cert. den.), 371 U.S. 889	24
U.S. v. Davis (9th Cir. 1981) 663 F. 2d 824, 830-831	29
United States v. Davis (9th Cir. 1983) 714 F. 2d 896, 897-8	29
U.S. v. Harrington (9th Cir. 1982) 681 F. 2d 612	1,26
U.S. v. Jones 80 S. Ct. 725, 362 U.S. 257	24

U.S. v. Kizer (9th Cir. 1983)
716 F. 2d 1268, 1274 26

U.S. v. Miller (1958)
357 U.S. 301 10

U.S. v. Morrison
449 U.S. 361 33

U.S. v. One Olivetti Electric 10-Key Adding Machine
406 F. 2d 1167 24

U.S. v. Pennington (10th Cir. 1980)
635 F. 2d 1387 26

U.S. v. Soto-Soto (9th Cir. 1979)
598 F. 2d 545 20

Codes Page(s)

Currency Act, 31 U.S.C. 1101(a) 5

Title 5 U.S.C. §907 19

16 U.S.C. §1a-16 12

18 U.S.C. §1254 2

Title 18, Fed. R. Crim. Proc., Rule 41 ... 3,8,9,10,12,16,23

Title 18, U.S.C. §2410 8

Title 18, U.S.C. §2510 8

Title 18, U.S.C. §2516 8

Title 21, §841, U.S.C. 2

Title 21, §846, U.S.C. 2

Title 21, §963, U.S.CC 2

26 U.S.C. §7607 12,19

UNITED STATES CONSTITUTION

4th Amendment 2

5th Amendment 2,31

6th Amendment 2,33

U.S. v. Davis

IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1984

JOHN JOSEPH HARRINGTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner hereby prays for a Writ of Certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit as to Order entered on July 15, 1982, and Memorandum entered on August 9, 1984, and the Court's denial of reconsideration entered on September 7, 1982 and October 22, 1984, respectively.

The U.S. Court of Appeals for the Ninth Circuit reversed the United States District Court for the Eastern District of California as to its Orders entered on August 3, 1981 and on October 23, 1981; and affirmed the judgment of the district court entered on October 5, 1983.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit issued an opinion in this matter which was published as **United States v. Harrington**, 681 F.2d 612. The United States District Court for the Eastern District of California issued two opinions in this matter which were published as **United States v. Harrington**, 520 F.Supp.93 and **United**

States v. Harrington, 524 F.Supp.292. The Court of Appeals and the District Court both issued Memorandum Orders which are affixed hereto at the Appendix.

JURISDICTION

On July 15, 1982 the United States Court of Appeals for the Ninth Circuit reversed the Orders of the District Court and remanded. On September 7, 1982, the Court denied the Petition for Rehearing. On August 9, 1984, the United States Court of Appeal for the Ninth Circuit affirmed the judgment of the United States District Court for the Eastern District of California as to Petitioner. On October 22, 1984, the United States Court of Appeals, Ninth Circuit, denied the Petition for Rehearing. This Court has jurisdiction to review this case under 18 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right to . . . have the assistance of Counsel for his defense."

Title 21, §841 provides in pertinent part:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . ."

Title 21, §846, United States Code provides in pertinent part:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine . . ."

Title 21, §963 provides in pertinent part:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Title 18, Federal Rules of Criminal Procedure, Rule 41 provides in pertinent part:

"(c) Issuance and Contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made

part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(f) Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12."

87 Stat. 1091, the Reorganization Plan No. 2 of 1973 provides in pertinent part:

"LAW ENFORCEMENT
IN ILLICIT DRUG ACTIVITIES

Section 1. Transfers to the Attorney General. There are hereby transferred, from the Secretary of the Treasury, the Department of the Treasury, and any other officer or any agency of the Department of the Treasury, to the Attorney General all intelligence, investigative, and law enforcement functions, vested by law in the Secretary, the Department, officers, or agencies which relate to the suppression of illicit traffic in narcotics, dangerous drugs, or marijuana, except that the Secretary shall retain, and continue to perform, those functions, to the extent that they relate to searches and seizures of illicit narcotics, dangerous drugs, or marijuana or to the apprehension or detention of persons in connection therewith, at regular inspection locations at ports of entry or anywhere along the land or water borders of the United States: **Provided**, that any illicit narcotics, dan-

gerous drugs, marijuana, or related evidence seized, and any person apprehended or detained by the Secretary or any officer of the Department of the Treasury, pursuant to the authority retained in them by virtue of this section, shall be turned over forthwith to the jurisdiction of the Attorney General; **Provided further**, that nothing in this section shall be construed as limiting in any way any authority vested by law in the Secretary of the Treasury, the Department of the Treasury, or any other officer or any agency of that Department on the effective date of this Plan with respect to contraband other than illicit narcotics, dangerous drugs, and marijuana: and **Provided further**, that nothing in this section shall be construed as limiting in any way any authority the Attorney General, the Department of Justice, or any other officer or any agency of that Department may otherwise have to make investigations or engage in law enforcement activities, including activities relating to the suppression of illicit traffic in narcotics, dangerous drugs, and marijuana, at ports of entry or along the land and water borders of the United States."

STATEMENT OF THE CASE

The Indictment in this case charged, in Count I, twenty-one (21) persons with a conspiracy to import and distribute hashish, including Defendant HARRINGTON. In twenty-two other Counts of the Indictment, in which HARRINGTON is not charged, other co-conspirators were charged with an array of narcotics violations or other offenses involved in the narcotics trafficking alleged. In one of the counts, seven other Co-Defendants were charged with conspiracy to violate the Currency Act, 31 U.S.C. 1101(a).

In March of 1978 Co-Defendant TRAVIS ASHBROOK and others, mostly living then in Texas, arranged

for a load of hashish to be purchased, and then smuggled into the United States through Martha's Vineyard, Massachusetts. By September, 1978, all of the hashish had been distributed. ASHBROOK then decided to move to California and invest in his brother's ski lodge and in another business with Co-Defendant, and government witness, STRIEDIECK.

Employees at Executive Aviation Services [EAS], Long Beach, California, advised Customs Agent Vernon Pitsker on October 11, 1978, that an individual using the name "Mike Taylor" called and wanted to charter a jet to Puerto Rico. "Taylor" said he was calling from a pay phone in Lone Pine, California.

On October 16, 1978, Pitsker observed "Taylor" arrive at EAS. "Mike Taylor" chartered a Lear jet to Puerto Rico for October 17, 1978. The charge for a round trip was $10,407.00 which "Taylor" paid in cash. When the EAS secretary asked when "Taylor" would be returning, "Taylor" said he was going to be in Puerto Rico for about a month and would only use the plane one way.

Customs and DEA surveillance of Taylor and his party in Puerto Rico revealed that he and his party had checked into the Dutch Inn, San Juan; he and his wife checked in using the name Mr. and Mrs. Taylor.

The following day, October 18, 1978, he rented a car using the name John Michael Evans. He and the others drove to Fajaro on the Eastern Coast of Puerto Rico, where they met a yacht and anchored about a mile off the coast. Later that day, "Taylor-Evans" and the others were observed to sail away from Puerto Rico in the same yacht. They were lost thereafter and at that point that was the end of that "investigation."

In January, 1980, a California State Grand Jury indicted 13 people for conspiracy to smuggle and distribute hashish based on an arrest and seizure in Marin County, California in May, 1979. Three of those indicted were old associates of ASHBROOK. BNE supplied Agent Pitsker in the fall of 1979 with investigative reports, analysis, and

Grand Jury testimony. Pitsker was told by agents of the California State Department of Justice Bureau of Narcotics Enforcement (BNE), that previously identified persons who were associates of ASHBROOK were actively engaged in smuggling large quantities of narcotics on a world-wide scale. Pitsker was told by these same State agents that on August 5, 1972, the Orange County Grand Jury, Santa Ana, California, indicted ASHBROOK and other identified persons for conspiracy to violate California State narcotics laws; and that an arrest warrant was outstanding for ASHBROOK. Pitsker then began his new investigation which included a review of DEA, BNE, Los Angeles Police Department and U.S. Customs investigative reports plus conversations with agents and investigators of these same agencies.

Pitsker's investigation then determined that since at least July of 1978, ASHBROOK had used the following aliases: Mike Taylor, John Michael Evans, and Michael P. Webber, and was using the name John Michael Evans in the community of Lone Pine, California, where he lived.

On March 20, 1980, BNE Agent Mike Barnes and Customs Agent Pitsker began surveilling ASHBROOK at Lone Pine, California. From then on Customs continued to investigate and conduct surveillance.

On June 7, 1980, Customs Agent Pitsker requested the Assistant United States Attorney, Julius Macias, to prepare a Title III wiretap application for Customs that was supported by an affidavit from Agent Pitsker, dated June 6, 1980. That Affidavit outlined the various offenses of which ASHBROOK and his associates were suspected: violations of the federal narcotics and racketeering laws. Agent Pitsker concluded from the evidence he had probable cause to believe ASHBROOK was planning to smuggle hashish into the United States.

In the wiretap application Pitsker sought authorization to intercept wire communications to and from ASHBROOK and six other named individuals concerning various narcotic offenses.

Assistant United States Attorney Macias had never

processed a Title III wiretap application; it was his first and last one, and he never questioned whether Customs was seeking the wiretaps for a narcotics investigation or a currency investigation. He was unaware that currency violations were not among those offenses authorizing wiretaps in Title 18.

The District Court granted the application and entered an order authorizing a wiretap. It noted that the interceptions were expected to produce admissible evidence of the commission of various offenses including racketeering, drugs, and currency violations.

The District Court subsequently entered four additional wiretap orders in connection with the investigation, each of which was supported by an Affidavit and application reciting **probable cause to believe that ASHBROOK and his associates were committing drug offenses and racketeering.**

As the basis for his investigative authority, Pitsker claimed in Paragraph 2 of his affidavit, that he was an "investigative or law enforcement officer . . . of the United States" within the meaning of §2410(7) of Title 18, United States Code: "an officer of the United States who is empowered by law to conduct investigations and to make arrests for offenses enumerated in §2516 of Title 18, United States Code."

Violation of the Currency Act is **not** one of the offenses enumerated in Title 18 U.S.C. §2510 authorizing wiretaps, and Customs agent Pitsker was not an eligible officer within the meaning of Rule 41(c) F.R.Cr.P.

While conducting surveillance of ASHBROOK at internal non-border areas of the United States, during what they suspected was a narcotics deal, Customs agents spotted a Mercedes Benz automobile of the type and description owned by HARRINGTON, who was discovered to be using an alias. Subsequently, the agents allegedly obtained information inferring that HARRINGTON had received narcotics from ASHBROOK and paid ASHBROOK for the drugs. Toll records revealed numerous calls between

HARRINGTON's residence and the residences of other suspected co-conspirators, and on several occasions in the fall of 1980, HARRINGTON was observed in one of the co-conspirators' residences using what was suspected to be cocaine and discussing criminal trials.

Customs Agent John F. Kellogg, at the direction of and the supervision of Agent Pitsker, prepared an Affidavit for a warrant to search HARRINGTON's residence. In the paragraph citing the authority of the agents to apply for and execute the search warrant, and the facts constituting probable cause the affidavits of Agent Pitsker for the wiretaps were included by reference and made a part thereof.

On October 16, 1980, a Magistrate authorized the search of Defendant HARRINGTON's residence. The warrant was directed to "U.S. Marshal or Duly Authorized Law Enforcement Officer or **Special Agent of the United States Customs Service.**" Customs Agents executed the warrant, arrested HARRINGTON, and seized currency, a telephone, papers, photos of his family and other personal items. Of the twenty-one (21) Government exhibits at trial, almost half came from this search of Defendant's house. Again, U.S. Customs agents are **not** eligible civil officers of the U.S. within the meaning of F.R.Cr.P. 41(c) to affect such an inland search and seizure.

ARGUMENT

I

THE SUPREME COURT SHOULD GRANT CERTIORARI TO ESTABLISH THE RULE OF LAW REGARDING THE SUPRESSION OF EVIDENCE SEIZED BY AN AGENCY IN EXCESS OF ITS JURISDICTION IN AN AREA OF ENFORCEMENT SPECIFICALLY WITHDRAWN BY STATUTE FROM THAT AGENCY; AND TO SETTLE THE DISPARITY AMONG THE CIRCUIT COURTS OF APPEAL AS TO WHETHER SUPPRESSION OF EVIDENCE SEIZED BY AN

UNAUTHORIZED OFFICER SHOULD EVER BE GRANTED ABSENT A VIOLATION OF A CONSTITUTIONAL RIGHT.

In a way, this case is one of first impression given the facts. The honorable court in **U.S. v. Miller**, 357 U.S. 301 (1958), found a warrantless search illegal when conducted in a manner that violated a statute. However, the case has not been interpreted broadly to mean that suppression of evidence is required when a statutory violation occurs because the statute involved was a codification of a Constitutional right as explained in **Payton v. New York**, 445 U.S. 573 (1980).

The subject of the statutory violation in this case is one of jurisdiction, and so is a case of first impression of significant national importance. Its moment of importance comes from the unique factual situation that the Customs Service not only conducted an investigation and executed a warrant in an area where they were without jurisdiction, but in an area where by Presidential Order and subsequent Statute, that jurisdiction had been specifically withdrawn from, and prohibited to them. The case then involves more than the judicial remedy for a search warrant applied for and executed by an officer lacking the requisite jurisdiction under Rule 41, F.R.Cr.P., but one issued to an officer whose jurisdiction for such a warrant had been specifically withdrawn and vested in another Agency. And, in this case, the Customs Agent in charge had not only actual knowledge of the Reorganization and its changes in jurisdiction, but had served in Washington, D.C. and worked on the same. He was then, and is now, opposed to the Reorganization and its jurisdictional changes.

The first consideration on this subject was in response to Defendant HARRINGTON's first Motion to Suppress limited to the question of probable cause to suspect evidence of narcotics violations based upon a plain reading of the affidavit in support of the Search Warrant. The Court ruled that the affidavit on its face supported reasonable

cause to believe that a search of HARRINGTON's home would yield evidence of narcotics trafficking.

The second Motion to Suppress by HARRINGTON was also limited. As the Court noted in its Order of August 3, 1981, pp. 1 and 2:

> "The defendant's motion raises a **narrow legal question** of first impression: the authority of agents of the Customs Service to apply for and execute search warrants in the course of an investigation into possible violation of the drug laws of the United States. The defendant contends that agents of the Customs Service have no such authority while plaintiff contends otherwise." (Emphasis supplied.)

As the Court noted in that same Order, pp. 2 and 3, the argument of the Government simply was:

> "... [T]he United States concedes that the authority exercised by the agent of the Customs Service who applied for and executed the instant warrant does not derive from 19 U.S.C. § 1595 and that, in fact, § 1595 has no application to the instant set of facts. The United States has urged, however, that the authority exercised by the agent derives from 26 U.S.C. § 7607 and Rule 41 of the Federal Rules of Criminal Procedure."

and the Defendant's response was:

> "Defendant responds to the argument of the Government by asserting that there is another provision of law that in fact takes away what § 7607 would appear to give. Specifically, the defendant cites the Reorganization Plan No. 2 of 1973, 87 Stat. 1091, 1973 U.S. Code, Cong. and Ad. News 3554."

The Court in its Order thereafter found (pp. 6 and 7):

> "In light of the above, the Court concludes that under the present set of facts, the Reorganization Plan No. 2 of 1973 deprives the agents of the Customs Bureau of any responsibility or

authority for the enforcement of the drug laws of the United States. The effect of Reorganization Plan No. 2 of 1973 is to amend 26 U.S.C. §7607 to except from its application the enforcement of said drug laws.

"As a side note, the United States argues that Federal Rule of Criminal Procedure 41 provides authority for the search challenged herein.

"... The Court is of the opinion that Federal Rule Criminal Procedure 41 is inapplicable to the case at bar. If Rule 41 were itself a grant of authority, there would be no purpose whatsoever for statutes such as 26 U.S.C. §7607 or 16 U.S.C. §1a-16. Since the Court is loathe to interpret any federal statute in such a manner as to render other federal statutes mere surplusage, the Court accordingly finds that Federal Rule of Criminal Procedure 41 implements the authority conferred by other sections, but does not in and of itself constitute a general grant of authority.

"For all of the reasons as stated herein, the Court grants the motion of Defendant HARRINGTON for suppression of all evidence and return of property."

The government moved for reconsideration. The Court in its Memorandum and Order of October 23, 1981, after disposing of additional arguments of the Government alleging Customs had been given some secondary authority for Narcotics investigations away from the border, and/or were conducting a Currency Violation investigation in fact, framed what became the new issue (pg. 8):

> "Having disposed of two of the government's preliminary contentions, the Court is now required to reach the more difficult issue raised by the government's motion to reconsider: does the total want of statutory authority for the application and execution of the search warrant necessitate the invocation of the exclusionary rule?
>
> "The government has cited the Court to a long line of cases which hold that technical violations of Rule 41 of the Federal Rules of Criminal Procedure do not warrant the invocation of the ex-

clusionary rule. While the Court concedes the validity and wisdom of the holdings of those cases, the Court finds them unhelpful to the question posed by the case at bar. Indeed, insofar as the Court can determine from the record, the application for and execution of the warrant was technically perfect. The issue here, however, is whether the application for and execution of the search warrant by a law enforcement officer without the authority to do so is a 'mere' technical violation?" (Emphasis added.)

The government argues in its Motion for Reconsideration, at pg. 6:

> "For the sake of argument, we assume that the special agent had no authority under 26 U.S.C. §7607 to obtain and execute the search warrant. The question then becomes whether this violation of Federal Rules of Criminal Procedure 41(c) warrants invocation of the exclusionary rule.
>
> "In similar cases, the Courts of Appeals have ruled that such violations do not justify extension of the exclusionary rule. **United States v. Burke**, 517 F.2d 377 (2nd Cir. 1975); **United States v. Pennington**, 635 F.2d 1387 (10th Cir. 1980); **United States v. Caucci**, 635 F.2d 441 (5th Cir. 1981)."

and at pg. 7:

> "The **Pennington** court followed the earlier **Burke** decision which had held that violations of Rule 41 should not lead to exclusion of evidence unless:
>
> 1. There was prejudice in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed, or
> 2. There is evidence of intentional and deliberate disregard of a provision in the Rule.

Burke at pp. 386-387. Same standard applied in this Circuit. **See United States v. Stefanson, supra.**

"It is clear that in the present case neither of the above two reasons for excluding evidence due to a Rule 41 violation applies."

All parties and the Court agreed that the search had been technically perfect, and there was therefore no issue as to the first exception stated in **Pennington and Burke, supra**, that the search would have been otherwise less abrasive in terms of Constitutional protection. However, there was no evidentiary hearing or finding of fact by the Court as to whether or not the second exception had been satisfied, i. e.,**a deliberate disregard for the Rule**.

Rather, the Court found it unnecessary to reach that question relying on the legal basis that a statutory violation of the Rule required suppression. In its Memorandum and Order of October 23, 1981, at pp. 9, 11 and 12, the Court concluded:

"Although **Pennington** is instructive on the issue, it is not on all fours with the instant case. The court in **Pennington** carefully noted that the Oklahoma officer who applied for and executed the warrant was authorized under Oklahoma law to apply for and execute warrants and to enforce the drug laws. Therefore, the **Pennington** case does not involve the situation where the law enforcement officer has no authorization under any law to conduct the search and in fact has specifically had said authorization taken away by direct action of the President of the United States.

"Furthermore, the decision of the Ninth Circuit in **United States v. Soto-Soto**, 598 F.2d 545 (9th Cir. 1979) would seem to be contrary to the **Pennington** decision. **Soto-Soto** did not involve the application for and execution of a search warrant, but it did involve a federal law enforce-

ment officer acting beyond the scope of his statutory authority."

★ ★ ★ ★ ★ ★

"In **Soto-Soto** the Ninth Circuit decided that one federal law enforcement officer may not use the statutory authority given by Congress to another federal law enforcement agency, and that the evidence acquired by a search conducted without any statutory authority must be excluded from the trial."

★ ★ ★ ★ ★ ★

"Thus this Court concludes that under **United States v. Soto-Soto** the evidence procured as a result of the search must be excluded.

"The government also argues that whatever relevance **Soto-Soto** may have been when it was decided, it has been overruled, albeit **sub silentio**, by **United States v. Payner**, 100 S. Ct. 2439 (1980) . . . The Government argues that **United States v. Payner** stands for the proposition that a violation of the law that does not rise to a violation of a constitutional right may not justify the invocation of the exclusionary rule. This Court cannot read **United States v. Payner**, a standing case, so broadly."

★ ★ ★ ★ ★ ★

"Additionally, of course, this Court feels constrained to decline the invitation to disregard Ninth Circuit precedent apparently on point. Without an explicit statement to the contrary from either the Ninth Circuit or the United States Supreme Court, this Court feels bound by **United States v. Soto-Soto**."

The government argued on appeal that by virtue of the Justice Department's processing and approval of the wiretap authorizations and search warrant applications for Customs, Justice had made a de facto deputization of those Agents and were thus enlisting them under the At-

torney General's authority to enlist the assistance of Customs in a joint investigation.

HARRINGTON argued that contrarily by implication the district Court had found a deliberate disregard for the law.

The government urged that **Soto-Soto** should not be read as the District Court had so done, and that even the statutory trespass of Rule 41 was still a technical violation, and that **Pennington** and **Burke** required more. The Government went on to argue that the **Payner** case, **supra**, actually now replaces both **Pennington** and **Burke** and that even a deliberate disregard for the law will not warrant suppression without Constitutional prejudice to the Defendant.

HARRINGTON argued that a statutory violation should automatically require suppression, that **Payner** cannot be read as broadly as the government would have, and that even under the standard of **Burke**, the record showed deliberate disregard for the Rule allowing the District Court to suppress.

The Court of Appeals in its Decision and Opinion of July 13, 1982, rendered a narrow ruling.

First the Court noted in its footnote at pg. i:

"1 [reference on page 2]

> "While the Reorganization Plan vests in the DEA exclusive responsibility for inland drug investigations, the Attorney General may request the assistance of other agencies to help enforce federal drug laws. See 21 U.S.C. §873(b); Exec. Order No. 11727, 38 Fed. Reg. §18357 (1978). The parties debate vigorously whether in this instance the Attorney General acting through his subordinates, solicited help from Customs. The District Court did not resolve this factual dispute, and the record is not sufficiently clear for us to resolve it independently."

The Court ruled narrowly, pp. 4 and 5:

"We hold **only** that a court should not **automatic-**

ally suppress evidence seized by an officer who, for some **technical reason**, should not have conducted the search. Cf. **United States v. Pennington**, 635 F.2d 1387, 1390 (10th Cir. 1980) (refusing to suppress evidence seized by a state officer not authorized by Fed.R.Crim.P. 41 to obtain or execute a federal warrant), **cert. denied**, 451 U.S. 938 (1981); **United States v. Burke**, 517 F.2d 377, 386-87 (2d Cir. 975) (same). There must be an exceptional reason, typically the protection of a constitutional right, to invoke the exclusionary rule. We can find no exceptional reason here." (Emphasis supplied.)

The Court further stated:

"We . . . must wait for another day to decide whether after **Payner** the exclusionary rule can ever apply absent some constitutional violation. The Seventh Circuit Court of Appeals believes it can. **United States v. Cortina**, 630 F.2d 1207, 1204-17 (7th Cir. 1980). We express no opinion on the matter at this time."

The District Court entertained an evidentiary question on whether the violation of Rule 41 was deliberate. At that hearing Agent Pitsker testified that he had seventeen (17) years in the Customs Service, and was very familiar with the Reorganization Plan and the subsequent Memorandum of Understanding between Customs and DEA. That Plan and Memorandum requires all information regarding narcotics investigations, other than at the points of entry and along the border, to be turned over to the DEA Agent in Charge and that DEA thereafter directs the investigation.

Pitsker was in Washington, D.C. at the time of the Reorganization Plan's creation, worked on the Plan, and its implementation. He personally was, and is, opposed to the Plan and its purposes.

His coordination with the DEA was not with the Agent in Charge as required, but instead he touched bases with a field agent he knew, DEA Agent ERNEST D. STRANGE.

EDITOR'S NOTE

PAGES 18 thru 32 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

At the time he decided to seek a wiretap, he went through an AUSA.

The AUSA who had processed the application of Pitsker for wiretaps testified that he had never before done a Title III application, **he assumed Customs and Pitsker had the authority to investigate narcotics violations, he acted solely on Pitsker's affidavit, and he believed currency violations were authorized wiretaps.**

In a Customs Report of Investigation dated September 4, 1979, Pitsker states in paragraph 9:

> "9. While this was supposed to be a joint investigation because of the suspected currency case, DEA did not cooperate. They held back information from us in Los Angeles and San Juan. Because of this and the fact there is no direct link to either the STEINBERG marijuana smuggling group or to any other narcotics group, I suggest we conduct an independent . . . investigation."

The Court ruled that the statutory violation was not a deliberate disregard for the law in a ruling that is clear error because the Court applied a wrong and overly restrictive standard under **Franks v. Delaware** (1978) 438 U.S. 154, see Argument II infra.

When the President and Congress, by Reorganization Plan No. 2 of 1973, 87 Stat. 1091, decided to end the bitter rivalry between the Justice Department and the Customs Service of the Treasury Department, it could not have done it in plainer language:

> "There are hereby transferred from the Secretary of the Treasury, the Department of the Treasury, and any other officer or any agency of the Department of Treasury, to the Attorney General **all** intelligence, investigative, and law enforcement functions, vested by law in the Secretary, officers or agencies which relate to the suppression of illicit traffic in narcotics, dangerous drugs, or marijuana . . ." (Emphasis added.)

The pertinent language of Title 5 U.S.C. §907 could not be plainer:

> "(a) . . . if the statute . . . has vested the functions in the agency from which it was removed under the reorganization, the function . . . shall be deemed as vested in the agency under which the function is placed by the plan."

The struggle between the Justice Department to centralize law enforcement, especially in the drug field, under the Department, and the resistance of the Treasury Department in yielding that jurisdiction is an old and bitter one, certainly well known to Customs Agents Pitsker and Kellogg.

In 1968, the Johnson Administration thought it had accomplished the mission of transferring from Treasury to Justice all such authority, and centralized authority in drug enforcement under the command of the Attorney General. Reorganization Plan No. 1 of 1968 (33 FR 5611, 82 Stat. 1367) transferred to the Attorney General from the Secretary of the Treasury all of the functions and authorities of the Bureau of Narcotics, and from the Secretary of Health, Education and Welfare, all of his authorities under the Drug Abuse Control Amendments of 1965 located in the Bureau of Drug Abuse Control. The intent was clear in the message of the President: ". . . Today, Federal investigation and enforcement of our narcotics laws are fragmented . . . Under this Reorganization Plan, the Attorney General will have full authority and responsibility for enforcing the laws relating to narcotics and dangerous drugs."

However, in 26 U.S.C. 7607, entitled "Additional Authority for the Bureau of Narcotics and Bureau of Customs," tucked away in the Internal Revenue Code, there remained full police powers for enforcement and investigation of laws relating to narcotic drugs and marijuana to those Treasury agencies.

By the inartful language of the Reorganization Plan, that left Customs with the same full authority as the new Bureau of Narcotics and Dangerous Drugs at Justice, and in

1970 Customs' friends in Congress amended that provision to reflect the deletion of the Bureau of Narcotics and affirm the equal authority of Customs.

The bitter and destructive rivalry between BNDD and Customs over jurisdiction of drug investigations that ensued is well documented in the legislative history of Reorganization Act No. 2 of 1973. As the District Court observed in its Opinion:

> "A secondary reason for the Reorganization Plan No. 2 of 1973 was the need to end an apparently bitter inter-agency rivalry that was actually hampering federal law enforcement efforts. Congressman Horton, speaking on behalf of the Reorganization Plan when it was being debated in the House of Representatives, discussed what he termed "the unhealthy rivalry" between the Bureau of Narcotics and Dangerous Drugs and Customs, 119 Cong. Rec. 18467 (1973). Horton told his colleagues: '... we cannot afford any longer the senseless rivalry and duplication between Customs and BNDD,' 119 Cong. Rec. 18468 (1973). The record is replete with similar expressions of concern, see, e.g., 119 Cong. Rec. 18471 (1973) (remarks of Congressman Brasco), 119 Cong. Rec. 18472 (1973) (remarks of Congressman Robison)."

This is not a case of technical violation of Rule 41, but the continued resistance of the Customs Service to yield to the mandate of the President and Congress in the exercise of their Constitutional roles in defining the divisions of authority.

In **U.S. v. Soto-Soto**, 598 F.2d 545 (9th Cir. [1979]), an FBI agent conducted a warrantless, Custom's style border search, in excess of its jurisdiction and invading that of Customs. The Court stated in absolute terms that it need not reach any Constitutional questions and that the statutory disregard for jurisdiction required suppression of the evidence.

In its opinion of this case the United States Court of Appeals for the Ninth Circuit reinterpreted its own decision in **U.S. v. Soto-Soto, supra,** and said that case had constitutional dimensions because of the difference in the requisite probable cause required by the two agencies in warrantless searches and therefore was not binding with regard to this case.

The Court of Appeals was wrong in interpreting its own decision in **U.S. v. Soto-Soto, supra,** and Defendant feels that the logic contained in the plain language of that case commends itself to be the ruling of this Honorable Court and be the law of the land:

> "The search here violated the statutory authority of FBI agents and the statutory authority for conducting border searches. The search is therefore illegal, the exclusionary rule applies, and the district court properly suppressed the evidence."
>
> ★ ★ ★ ★ ★ ★
>
> "This court need not harbor the same fears expressed by the Supreme Court in **Caceres, supra.** Application of the exclusionary rule here will not likely deter Congress from continuing to define the powers of respective branches of federal law enforcement. Rather, exclusion will deter individual officers from ignoring these definitions."
>
> ★ ★ ★ ★ ★ ★
>
> "Whether the defendant was injured in any way or his constitutional rights were violated is not an essential issue. Statutory law was disregarded. Exclusion of the evidence seized is the only available effective deterrent of such disregard."
>
> ★ ★ ★ ★ ★ ★
>
> "Because this court affirms the district court's suppression of the evidence on the basis of the statutory violation, it is not necessary to discuss Appellant's argument as to 'expectation of privacy,' an issue relevant only to analysis of a constitutional violation."

(**U.S. v. Soto-Soto, supra**, all at P. 550)

If reorganizations and statutory dilineation of authority are to mean anything, this Honorable Court must do its part by enforcing the same and suppressing the fruits of trespasses in a significant way. In this case the violation of jurisdiction consisted of an illegal two-year investigation, the illegal wiretapping of six public payphones, and multiple illegal search warrants such as the one in question. If the Court does other than invoke a remedy, it in effect emasculates these Statutes effecting changes of jurisdiction in law enforcement.

Certiorari should be granted on this issue of national significance.

ARGUMENT
II

THE SUPREME COURT SHOULD GRANT CERTIORARI SINCE THE DISTRICT COURT AND COURT OF APPEALS RULED IN A MANNER CONTRARY TO THE ESTABLISHED LAW AND DECISIONS OF THIS COURT BY DENYING DEFENDANT STANDING TO TRAVERSE THE AFFIDAVIT FOR THE SEARCH WARRANT OF HIS RESIDENCE WHICH WAS EXECUTED WHILE HE WAS PRESENT, BECAUSE THE PORTIONS TO BE TRAVERSED WERE CONTAINED IN DOCUMENTS ATTACHED AND INCORPORATED BY REFERENCE, AND THE DEFENDANT HAD NO INDEPENDENT STANDING TO ATTACK THOSE DOCUMENTS APART; FURTHER, THE DISTRICT AND CIRCUIT COURTS APPLIED THE WRONG STANDARDS UNDER FRANKS v. DELAWARE (1978) 438 U.S. 154 TO ATTACK A SEARCH WARRANT AFFIDAVIT FOR EITHER INCLUSION OF FALSE STATEMENTS OR OMISSION OF STATEMENTS NEGATING PROBABLE CAUSE.

Either this is a case of first impression of extreme national importance with regard to standing, or the District Court and Court of Appeals have ruled in complete contradiction to the decisions of this Court regarding the Defendant's right and standing to traverse the affidavit for the search warrant of his residence where he was personally present when executed.

In the instant case, Agent Kellogg, under the supervision and at the direction of Agent Pitsker, wrote an affidavit, then sought and obtained a search warrant for the Defendant's house. They executed the warrant, and the Defendant was present at the time of the search.

Prior thereto, Agent Pitsker had sought a Court Order for a Title III wiretap, claiming that they, as Customs Agents, were authorized under Title 18 to investigate narcotics, and associated offenses, and that the wiretap was for a narcotics, and associated offenses, investigation.[1]

In the particular affidavit for the search warrant in this case, in paragraph 3 of that document, the only claim to authority for the search warrant, and the allegations of facts supporting probable cause in the affidavit, are made by the affiant stating, "I allege that the facts contained in the affidavits of Vernon G. Pitsker... [enumeration of the four wiretap authorization affidavits] . . . show that:

(a) probable cause exists . . ." etc.

The Customs Agent used these attached, and incorporated, documents to set forth his authority under Rule 41, F.R.Cr.P., to apply for and execute the search warrant for HARRINGTON's residence. **Had he not falsified that**

[1]Title III does not authorize wiretaps for investigations of currency violations. Agent Pitsker testified in Court they were actually within their jurisdiction because it was actually a currency violation investigation. If so, he then lied to the court authorizing the wiretap as to the real purpose and was circumventing the restrictions of the law. This places his posture under the commands of this Honorable Court in **Franks v. Delaware** (1978) 438 U.S. 154.

portion of his affidavit, and truthfully set forth his lack of authority to apply for the search warrant, and that the same had been specifically withdrawn from him by the President and the Congress, it is doubtful that the magistrate would have issued him the search warrant. There were also material misstatements of facts in support of the allegation of probable cause that might also have caused the warrant to be quashed. However, the Court denied the defendant a hearing in which to make a record because of the determination that he lacked standing.

Simply put, the investigating officer had perjured himself, or at the very least made key and critical reckless omissions, among other things, as to his authority to investigate and seek the warrant, and for clerical expedience, rather than retype those allegations on new pieces of paper, he made those averments to the magistrate by attaching to the affidavit, and incorporating by reference therein, the four affidavits for wiretap authorizations.

The law is uncontroverted and clear that the Defendant has absolute standing to challenge the affidavit for the search warrant of the house where he was residing and present at the time of the search, and the object of the search; **U.S. v. Jones**, 362 U.S. 257, 80 S.Ct. 725; **U.S. v. Anderson** (9th Cir.) 453 F.2d 174.

It is also well settled law that for purposes of issuing a search warrant and establishing probable cause the affidavit includes any attachments and exhibits, especially when incorporated by reference. **U.S. v. One Olivetti Electric 10-Key Adding Machine**, 406 F.2d 1167; **U.S. v. Brooks**, (1962), 303 F.2d 851, certiorari denied, 371 U.S. 889; **Clay v. U.S.** (1957) 246 F.2d 298, certiorari denied, 355 U.S. 863.

The Magistrate, in following the well settled law, when reviewing the authority of the agents to apply for and execute the warrant, and the facts alleged for probable cause, then read the four wiretap affidavits which were at-

tached and incorporated. Were they not part of the search warrant affidavit and considered as incorporated, the warrant could not have issued since they were the source of facts alleged for authority and probable cause. It is inconceivable that the law does not equally conceive them as an integral part of the affidavit for purposes of traversal.

Twisting logic, and distorting the issue, the government was successful in confusing the lower Courts into ruling that since the Defendant did not have standing to independently challenge the wiretaps and affidavits thereto, he did not acquire standing to challenge them as part of the affidavit for the search warrant for his house.

WE DO NOT ARGUE THAT THE DEFENDANT HAS, OR ACQUIRED, STANDING TO CHALLENGE THE WIRETAPS OR THE AFFIDAVITS THERETO.

In this case we are talking about the affidavit for the search warrant for the Defendant's house and his standing and right to challenge the truthfulness of the affidavit for the search warrant for his house. The legal issue is whether he **loses** that standing simply because the affiant chose as a clerical style not to retype certain allegations upon which the magistrate must judge, but stylistically to make these averments by use as attachments and their incorporation by reference.

Or to put it bluntly, can an officer lie or deliberately or recklessly omit key facts and then avoid review of an affidavit for a search warrant by artfully attaching documents including them by reference, so that the subject of the search lacks standing to independently challenge.

The answer must be, of course, in the negative, or the right and standing to traverse will not depend on the accepted standards set by this Court, but upon the clerical style of writing by the affiant, and the ability to test his veracity can be placed beyond reach by his cunning.

Secondly, Petitioner points out that the United States

District Court in its Second Opinion (this Petition at page 69-70) cited **United States v. Pennington**, 635 F.2d 1387 (10th Cir. 1980) for the proposition that the attacker of the affiant on the search warrant must demonstrate a "deliberate or intentional" act or **omission** on the part of the affiant in order to obtain relief. See **United States v. Harrington**, 524 F.Supp. 292 (E.D. Calif. 1981).

It is evident that willful or reckless **omissions** stand on the same plane as willful or reckless **inclusions. United States v. Kizer**, 716 F.2d 1268, 1274 (9th Cir. 1983).

Such a limitation flies in the face of the commanding authority of this Honorable Court in **Franks v. Delaware** (1978) 438 U.S. 154, 57 L.Ed.2d 667, 682, 98 S.Ct. 2674, where the Court held that **either deliberate falsehood** or **omission or reckless disregard for the truth** or **omission** provided the vehicle to attack the search warrant.

Following remand to the District Court after the 9th Circuit had initially acted in **United States v. Harrington**, 681 F.2d 612 (9th Cir. 1982), the District Court held an evidentiary hearing where, time and time again, the District Court and the attorneys for the defense and Government labored under the misconception that the defendant petitioner had to demonstrate a "willful, intentional, deliberate" effort to circumvent the Reorganization Plan No. 2 of 1973.

Reference to the Evidentiary Hearing transcript at pages 1, 3, 7, 13, 14 at lines 7-10, 14 at lines 11-16, 19, lines 15-19; indeed, at page 19 lines 15-19, the District Judge said, inter alia,

> "... Counsel, the hearing on the motion is granted only insofar as it goes to the **deliberate** violation of the law. It is denied insofar as it goes to the issue of fruit of the poisonous tree and/or material (mis) representations in the affidavit."

Further allusion to the wrong standard of falsity or omission in a search warrant affidavit under **Franks v. Delaware, supra**, occurred in the evidentiary hearing at pages 23, 24, 25 where **United States v. Pennington,**

supra, supposedly required the defendant attacker to show a "willful and deliberate" falsification (or omission).

See also Evidentiary Hearing Transcript at page 26, lines 13-15, 27, 113, 223, 229, 239, 243.

At page 239 of the Evidentiary Hearing of November 19, 1982, on January 4, 5, 1983, the Court alluded in his ruling, that the "issue before the Court simply was whether Agent Pitsker **willfully, deliberately** and **intentionally** violated the letter and spirit of Reorganization Plan No. 2 of 1973."

The Court then concluded at page 243 of that hearing that the defendant (this Petitioner Harrington) "had failed to prove **intentional, deliberate** and **willful** violations of the spirit/intent of the Reorganization Plan of 1973."

Thus it is abundantly evident that in spite of the command of **Franks v. Delaware**, 438 U.S. 154, 171, 57 L.Ed.2d 667, 682, 98 S.Ct. 2674 that **either** the standard of **deliberate** falsehood **or reckless disregard for the truth** (or, of course, similar **OMISSIONS** which would negate probable cause to issue the warrant), the District and Circuit Courts have sought to force petitioner to meet the **higher** standard of demonstrating a **willful, deliberate** and **intentional** effort to mislead; moreover the opinions thus far fail to recognize that truly the **omissions** and **concealments** of Agent Pitsker were at least of reckless disregard for revealing the truth of his position:

> (a) that in seeking the initial Title III wiretap, the real goal was to effect a narcotics investigation since he then believed that **Ashbrook,** the target of the wiretaps, was a member of a known group of narcotics smugglers, and therefore he, as a Customs agent, was exceeding his statutory fetter and tether under the Reorganization Act No. 2 of 1973 which took such narcotics investigations away from the Department of the Treasury and placed it solely in the Department of Justice; see also Rule 41(c), F.R.Cr.P. cited supra.

(b) that in seeking the initial Title III wiretap warrants he represented that it was also a **currency** violation **investigation**, thus making his effort not eligible for a Title III wiretap; within the meaning of F.R.Cr.P. Rule 41, Pitsker was not a "civil officer of the United States authorized to enforce or assist in enforcing any law thereof or a person so authorized by the President of the United States."

(c) that in seeking the search warrant to search petitioner Harrington's Del Mar, California home, a situs having nothing whatsoever to do with the border or any other area of legitimate U.S Customs scope, he, Pitsker, was directing the affiant, Customs agent Kellogg, to conceal the lack of authority that no longer existed in either of them to conduct narcotics investigations and seek, internal to the United States, search warrants in narcotics cases." See also Rule 41(c), F.R.Cr.P. cited supra.

(d) that in seeking the search warrant to search petitioner Harrington's home, he, Pitsker, was directing Customs agent Kellogg to conceal and omit from the affidavit that the attached Title III wiretap warrants/affidavits had been illegally issued under Title III and thus were once again being illegally used to support probable cause to conduct an inland **narcotics search** of a private home nowhere remotely connected to the U.S. Border. See Rule 41(c), F.R.Cr.P., cited supra.

Such **omissions** and **failures** to **disclose** constituted at least reckless disregard for the revealing of the truth, and had the truth been revealed, probable cause for issuance of the search warrant to search petitioner's home would have vanished.

While **Franks v. Delaware**, supra, a 1978 case, was clearly commanding the law of the land, providing for the

more severe burden of demonstrating a **willful, intentional, and deliberate** use of false statements (or omissions of like material that would negate probable cause), it concomitantly provided the lesser burden of establishing merely a **reckless disregard** of the truth (or omissions of like material that would negate probable cause).

The U.S. 9th Circuit, in a subsequent case, has recognized the commands of **Franks v. Delaware**, supra; see **United States v. Davis**, 663 F.2d 824, 830-831 (9th Cir. 1981); **United States v. Davis**, 714 F.2d 896, 897-8 (9th Cir. 1983).

At the evidentiary hearing, it was established that Vernon G. Pitsker, the affiant in the Title III wiretap warrants, and the director of Agent Kellogg on the warrant used to search petitioner Harrington's home (the Pitsker-Kellogg role was established by **Stipulation** at the January 4, 5, 1983 Evidentiary Hearing).

(a) had been a special agent, U.S. Customs Service, for 17 years.

(b) In 1973 became fully and completely aware of the Reorganization Plan No. 2 of 1973, which took away jurisdiction of narcotics offenses from the U.S. Customs and placed it with the Dept. of Justice (Evid. Hrg., page 44-45).

(c) recognized that said Reorganization Act No. 2 of 1973 meant that U.S. Customs agents were not to engage in, or were not to primarily engage in the investigations of narcotics offenses; that it was clear to him that they could not investigate narcotics offenses away from ports of entry and along land or water borders of the United States;

(d) that he read and fully understood a 1975 publication called *Memorandum of Understanding* which defined the limitations of the Reorganization Plan No. 2 of 1973, which was sent to all U.S. Customs agents. (Evidentiary Hearing, pages 45-47).

(e) admitted that he had applied for the Title III

wiretap knowing that "currency" violations were not a permissable object of a Title III wiretap; (Evidentiary Hearing, 63).

(f) applied for the wiretap under Title III to really conduct a narcotics investigation, and the "currency violation" area was not the true object and was thus wrongly placing himself in a narcotics investigation. (Evidentiary Hearing, 64, 65, 66).

(g) claimed that an Assistant U.S. Attorney had told him that he, a Customs agent, could still and nonetheless perform narcotics investigations in spite of the Reorganization Plan. No. 2 of 1973 (Evidentiary Hearing, 67-68, 69-77).

In further proof of the reckless disregard of the truth and/or reckless omission of the truth, petitioner established that the Assistant U.S. Attorney, one Macias, who assisted U.S. Customs Agent Pitsker in preparation of the Title III wiretap, had little knowledge or cognizance of the Reorganization Plan of 1973, had never before done a Title III wiretap, wrongly believed that Customs agents **could** yet conduct narcotics investigations, and wrongly felt a currency investigation was a permissible subject for a Title III wiretap. (Evidentiary Hearing, 91-113).

Through **Robert C. Wiltse**, supervising U.S. Customs officer and supervisor of **Pitsker**, petitioner proved that Pitsker had voiced an opinion in 1973 that the Reorganization Plan No. 2 of 1973 "was a bad bureaucratic decision," and that he, Pitsker, had actively opposed divestiture of narcotics jurisdiction from the U.S. Customs Service (Evidentiary Hearing, 164-186), thus establishing with lucidity that Agent Pitsker, a 17-year veteran of the Customs Service, was fully familiar with his restrictions, tethers, and fetters imposed by the 1973 Reorganizations Plan.

In spite of all of the above, Pitsker, and Kellogg at his direction, concealed and omitted and falsified their true roles and objectives from magistrates in seeking the Title III wiretaps and the later search warrant for petitioner's home

which had attached to it the illegally issued Title III wiretap warrants.

In view of the foregoing, Certiorari should issue, in this case of First Impression and national consequence, to the U.S. Court of Appeals for the 9th Circuit.

ARGUMENT
III

THE COURT SHOULD GRANT CERTIORARI IN ORDER TO DETERMINE WHEN THE TOTALITY OF THE PROSECUTORIAL MISCONDUCT WITH ITS CUMULATIVE EFFECT CONSTITUTES A VIOLATION OF PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHTS AND TRIGGERS THE COURT'S SUPERVISORY FUNCTION.

In October of 1980, the Indictment in this case was handed down in the Eastern District of California. Petitioner and Co-Defendants CHESTER BOWYER and CHARLES SCOTT were all represented by the same Counsel, JOSEPH MILCHEN. He continued to represent all three for the next six months, held joint conferences, and brought simultaneous motions to suppress. In March of 1981, Petitioner substituted in present Counsel, and Milchen continued in his representation of BOWYER and SCOTT.

As the result of a search warrant executed by Customs in the instant case, a collateral case was brought in the Southern District of California against BOWYER and SCOTT. During the search of SCOTT's residence in the Southern District, in which BOWYER was also temporarily residing, Agents found contraband and also confiscated $20,000.00. In May, 1981, BOWYER was convicted of the possession charge in the Southern District, remanded to custody, and his bond exonerated in the Southern District. He had another bond posted in the instant case in the

Eastern District.

From custody BOWYER called Agent KELLOGG to talk about a possible deal in exchange for testifying against co-defendants HARRINGTON and SCOTT in the instant case.

KELLOGG, PITSKER approving, and the AUSA prosecuting this case being informed and not objecting, agreed to get him released on bail pending appeal from the judgment of the Southern District on the same bond instrument filed as bail in the Eastern District, make his cooperation known to the Court for sentencing, and to release to him the $20,000.00 taken from SCOTT's residence. BOYYER had testified under oath, informed KELLOGG during these discussions, and still testified under oath, that the money belonged to SCOTT. SCOTT, and BOWYER, additionally had assigned those sums to attorney MILCHEN, which assignment was on file with Customs. KELLOGG was well aware of the assignment according to his own testimony.

BOWYER then agreed to, and in fact, did make a statement to the Agents in this case, who then promptly delivered on their promises. BOWYER was released on bail pending appeal from the Southern District on the bond instrument securing his appearance in the Eastern District, and at KELLOGG's suggestion, filled out Customs forms under oath claiming that the $20,000.00 was his, and then KELLOGG released the same to BOWYER ignoring the assignment on file.

No attempt was made to go through BOWYER's attorney of record in the case, MILCHEN, for he would have had a duty to alert HARRINGTON so that HARRINGTON could make a timely motion to examine that information which was provided from actual knowledge as opposed to statements of fact learned in a privileged setting. The government remained silent for over a year after that. BOWYER was the only percipient witness against HARRINGTON, without whose testimony the case would fail.

In March of 1983, after Petitioner learned of the government's intention of calling Co-Defendant BOWYER

as a prosecution witness, an Evidentiary Hearing was held on Petitioner's motion to exclude the testimony of BOWYER or dismiss the indictment. At the hearing neither BOWYER, attorney MILCHEN, nor HARRINGTON could recall specific dates and subject matter of conversations held between the two Defendants and their attorney, JOSEPH MILCHEN. They all testified that their memory and recollection of these matters would have been better if the hearing was not held almost two years after the termination of joint representation of Petitioner and Co-Defendant BOWYER. MILCHEN's secretary, at the time, who had kept records, had left his employ and her whereabouts were unknown.

Petitioner recognizes that under the decision of this Honorable Court in **U.S. v. Morrison**, 449 U.S. 361, a violation of the Sixth Amendment right to counsel does not, per se, require a dismissal of the indictment and that where prejudice to the Defendant is shown, the appropriate remedy is exclusion of the testimony or evidence. Petitioner does urge that the government's flagrant misconduct in procuring the testimony of Co-Defendant BOWYER and the delay in informing Petitioner made it impossible for Petitioner to prove that Co-Defendant's testimony relied on facts gained through joint conversations and meetings held during the course of six months of representation by the same attorney.

The government in this case has violated the Petitioner's Sixth Amendment Right to Counsel by contacting Co-Defendant BOWYER without regard to the effect on Petitioner's privileged communications held between Attorney MILCHEN and the defendants as evidenced by the government's refusal to contact BOWYER's attorney of record, JOSEPH MILCHEN. In addition, the government's purposeful delay in revealing BOWYER's new status compounded Petitioner's burden to produce evidence of the prejudice to him resulting from the government's intrusion into his Sixth Amendment right to counsel.

Where the government and its agents have embarked

on a course of conduct which has violated Petitioner's Sixth Amendment Right to Counsel, bribed a Co-Defendant and condoned and urged perjury in order to procure the testimony of BOWYER against the Petitioner, this Court, without regard to the prejudice to Defendant, should exercise its supervisory powers to deter this cumulative and outrageous conduct by the Government in violation of Petitioner's Fifth Amendment Right to Due Process.

Certiorari should be granted.

ARGUMENT
IV

THE DISTRICT COUNT'S RULING, AND ITS SANCTION BY THE COURT OF APPEALS, THAT A MULTIPLE CONSPIRACY DOES NOT EXIST, BUT RATHER A SINGLE ONE, WHEN THERE WERE THREE SEPARATE SCHEMES WITH DIFFERENT ACTORS FOR THE MOST PART, BECAUSE A COMMON "CORE" GROUP WERE COMMON TO ALL THREE DIRECTLY CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Indictment alleges that the Defendant participated in one (1) conspiracy that took place between October 1978, and October 1980. But the proof at trial reveals that three (3) conspiracies took place in this time.

The controlling decision on the question of a single conspiracy being charged and multiple conspiracies being proven is the Supreme Court opinion of **Kotteakos v. United States**, (1974) 328 U.S. 750. In that case, one Brown made fraudulent applications for loans insured by the Federal Housing Administration. These various loans were made at different times on behalf of several persons, many of whom had no connection with one another. The Indictment charged thirty-two (32) people with one (1) single conspiracy to defraud the Government. At a trial

which convicted seven (7), the evidence proved eight (8) more separate conspiracies by unconnected, separate groups of conspirators. The Supreme Court reversed, and in elaborating upon the case, stated:

> "Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects, except for Brown, the common figure, no conspirator was interested in whether any loan except his went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies, therefore, were distinct and disconnected. There was no drawing of all together in a single, overall, comprehensive plan.
> **Blumenthal v. United States**, (1947) 322 U.S. 539, 558.
> The **Kotteakos** opinion stated:
> "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not been taken place."
> 328 U.S. at 774.

In the instant case the Indictment charged 21 persons with Conspiracy to Import and Distribute Hashish, and sets forth 22 overt acts. The first is a flight by alleged leader ASHBROOK to Puerto Rico in October of 1978 to repay money. The other 21 overt acts cover a scheme beginning in March of 1980 to import hashish in 1981. Defendant HARRINGTON is not mentioned in a single overt act.

The evidence at trial showed that a group of about eight "core" persons, out of the 21 co-conspirators charged, were residing in Texas, imported a load of hashish in March of 1978, all of which was distributed by September 1978. Defendant HARRINGTON was neither involved nor knowledgeable about that scheme. None of the overt acts occurred in the Eastern District of California, and had that scheme been charged separately, the District Court prob-

ably would have lacked jurisdiction.

ASHBROOK and some of the other "core" members then moved to California to open up legitimate businesses. According to government witnesses there were no further plans or discussions of hashish dealing. After a while, ASHBROOK initiated a scheme to import hashish in the summer of 1979. That hashish apparently came into California around September of 1979, and was all distributed by February of 1980. It was in this second scheme that HARRINGTON is alleged to have been involved, along with the "core" members, and a number of others not at all involved in the 1978 scheme.

ASHBROOK and his "core" members again planned, after a while, to bring in another load in 1981. 21 of the 22 overt acts set forth in the Indictment go towards that 1981 scheme. Not only is HARRINGTON not involved, but the government's own wiretaps reveal that there was an affirmative decision by the "core" group to exclude HARRINGTON and his partner, and that they were in fact told that ASHBROOK and his "core" group were out of business and not conducting any further ventures. The later scheme involved the largest number of charged co-defendants, none of whom outside the "core" group were involved in the two earlier schemes.

The problem in this case, of course, is that there were different understandings depending on the actors. For the "core" actors, there was a continuing agreement and concert of actions that clearly could show a continuing single conspiracy. However, for other actors, such as HARRINGTON, there was clearly an expression between the major actors that there was a termination of activities.

The heart of any conspiracy, of course, is an agreement to commit an illegal act. It is true that the law says when one joins a conspiracy, one adopts the conspiracy and is liable for the actions of the co-conspirators, even those unknown, prior to and after the particular defendant participated in the conspiracy. However, this rule of law breaks down, if in fact that agency theory is negated by a factual showing that

the so-called agents of the defendant co-conspirators informed him that the relationship no longer exists. One cannot be held responsible for the actions of an agent who has told you that he is no longer going to act as an agent and whom you believe to be dormant.

After the Court Trial, the Court requested briefs by the Government and the Defendant, because, as the Court indicated when it rendered its verdict, the factual finding of HARRINGTON's involvement in but one of the schemes was clear, most of the evidence as to the three schemes uncontroverted, and all that remained was the legal question. The Court in its finding of a single conspiracy, as opposed to a multiple one, based its ruling on the fact that many of the alleged members (the "core" group) participated in all three schemes with similar goals, plans, and method of operations, and the lapse between the three schemes a suspension of activities. The Court ignored, and did not comment, on the lack of participation in, the uncommon goals and methods, of the vast majority of actors that only participated in, and only knew of, one of the three individual schemes. Undisputedly, HARRINGTON was a member of the latter group.

The Court in its ruling, and the Court of Appeals in affirming, have ruled in direct contradiction to this Court's decisions in **Kotteakos v. U.S., supra**, and **Blumenthal v. U.S., supra**. Neither HARRINGTON nor the others, outside of the "core" group, involved in scheme No. 2, were interested, or even knew, of the other ventures, nor did their activities in any way aid, promote, or depend on the other ventures. The same might be said of those, other than the "core" group, involved in schemes No. 1 and No. 3.

In **Kotteakos v. Blumenthal** there were 1 or 2 actors common to all of the schemes that were separate conspiracies. Their commonalities did not make the individual schemes a single conspiracy. The district court in ruling that the 3 separate schemes in this case were but a single conspiracy based on the commonality of the eight members of the "core" group, of which HARRINGTON was not a

member, directly contradict the Supreme Court's ruling in those cases.

CONCLUSION

In the case at bar, this Honorable Court has been presented with several significant issues created by the repeated misconduct and disregard of the law by the agents involved.

The Court should grant certiorari in this case to enforce its rule of law with regard to multiple versus single conspiracy.

The Court should grant certiorari to establish the rule of law that law enforcement agents who have taken an oath to uphold the Constitution and the laws of the United States cannot exert authority in a clear violation of a statute. The judicial remedy of suppression of evidence seized by law enforcement authorities who disregard their jurisdictional limitation is the only way to deter those like the Customs agent in this case who feel that they, in the interest of law and order, can disregard the will of the President and the Congress. The Court should grant certiorari to reaffirm standing of a defendant to traverse the affidavit for the search warrant of his own house and that it cannot be stripped away from him by stylistically writing that affidavit through **the use of attached documents he might not independently have standing to challenge.** The Court should grant certiorari to deter the cumulative misconduct that occurred in this case with the purchase of a co-defendant's testimony in the middle of the proceedings without regard to the defendant's right to due process and right to counsel.

Respectfully submitted,

_____

ROGER S. HANSON

_____

KEVIN ROBINSON

_____

ALAN M. MAY
Attorneys for Petitioner

STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, Appellant knows of no cases that are related to this Appeal which are now pending before this Court.

Dated:_____

_____

ALAN M. MAY
Attorney for Petitioner

APPENDIX

FILED
Oct. 22, 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

MINUTE BOOK COPY

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHN. J. HARRINGTON, JR.,

Defendant-Appellant.

ORDER

No. 83-1275

Before: HUG, TANG and FARRIS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

ORIGINAL FILED
APR 6, 1983
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By_____
DEPUTY CLERK

DONALD B. AYER
United States Attorney
THOMAS T. COURIS
Assistant United States Attorney
Chief, Narcotics & Dangerous Drugs Division
Room 3305, Federal Building
650 Capitol Mall
Sacramento, California 95814
Telephone: (916) 440-2331

LODGED
APR 5, 1983
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By _____
DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CR. No. S-80-157-RAR

ORDER

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN J. HARRINGTON,

Defendant.

The above-entitled matter came on regularly for hearing on defendant's Motion to Dismiss Indictment, or Alternatively Suppress Evidence and Exclude Testimony before the Honorable Raul A. Ramirez on March 31, 1983. Thomas T. Couris, Assistant United States Attorney, appeared on behalf of the UNITED STATES OF AMERICA and Alan M. May, Esq., appeared on behalf of defendant JOHN J. HARRINGTON. Having reviewed and considered the memorandum of points and authorities submitted in support of and in opposition to the motion, hearing the testimony of the various witnesses called by the moving party and considering the arguments of counsel, the Court now makes the following orders:

IT IS HEREBY ORDERED as follows:

1. That defendant JOHN J. HARRINGTON'S Motion to Dismiss Indictment, or Alternatively Suppress Evidence and Exclude the Statement of CHESTER A. BOYER is denied;

2. That this matter is set for court trial before the above-entitled Court on May 18, 1983, at 9:00 a.m.;

3. That the parties shall submit to the Court in writing a written stipulation as to those facts agreed upon between the parties on or before May 9, 1983.

DATED: April 5, 1983

RAUL A. RAMIREZ, Judge
United States District Court

I hereby certify that the annexed
instrument is a true and correct copy
of the original on file in my office.
ATTEST: J. R. GRINDSTAFF
Clerk, U.S. District Court
Eastern District of California
By_____
C. E. O'Hara
Deputy Clerk
Dated_____

No. CR.S-80-157 RAR
ORDER

Aug. 4, 1981
ORIGINAL FILED
Aug 3, 1981
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By_____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN J. HARRINGTON,

Defendant.

The above-entitled matter came on regularly for hearing on defendant's motion for suppression of evidence before the Honorable Raul A. Ramirez on July 15, 1981. Thomas T. Couris, Assistant United States Attorney, appeared on behalf of the UNITED STATES OF AMERICA and Alan M. May, Esq. appeared on behalf of defendant, JOHN J. HARRINGTON. Having reviewed and considered the memorandum of points and authorities submitted in support of and in opposition to the motion, the respective arguments of counsel, and the matter having been submitted on the pleadings pursuant to agreement of counsel in open court, the Court now makes the following findings and orders in response to defendant's motion for suppression and return of specific property:

The defendant's motion raises a narrow legal question of first impression: the authority of agents of the Customs Service to apply for and execute search warrants in the course of an investigation into possible violation of the drug laws of the United States. The defendant contends that agents of the Customs Service have no such authority while plaintiff contends otherwise.

At the outset, the United States concedes that the authority exercised by the agent of the Customs Service who applied for and executed the instant warrant does not derive from 19 U.S.C. § 1595 and that, in fact, § 1595 has no application to the instant set of facts. The United States has urged, however, that the authority exercised by the agent derives from 26 U.S.C. § 7607 and Rule 41 of the Federal Rules of Criminal Procedure. § 7607 of Title 26

reads as follows:

> Officers of the customs (as defined in § 401(1) of the Tariff Act of 1930, as amended; 19 U.S.C. § 1401(1)), may --
>
> > (1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under the authority of the United States, and
> >
> > (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in § 102(16) of the Controlled Substances Act) or marijuana (as defined in § 102(15) of the Controlled Substances Act) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violations.

Although § 7607 was last amended in 1970, the amendments made therein were of a technical rather than a substantive nature, and as such, absent any other provision of law, § 7607 authorizes the challenged conduct of the agent of the Customs Service who applied for and executed the search warrant under scrutiny herein.

Defendant responds to the argument of the Government by asserting that there is another provision of law that in fact takes away what § 7607 would appear to give. Specifically, the defendant cites the Reorganization Plan No. 2 of 1973, 87 Stat. 1091, 1973 U.S. Code, Cong. & Ad. News 3554. As both the text of the Reorganization Plan and the Presidential transmittal memorandum make plain, the purpose of the Reorganization Plan was to remove all investigatory and enforcement functions **vis-a-vis** the drug laws from the Customs Service and to place those functions in the newly-formed Drug Enforcement Administration. The primary reason for the reorganization was the conviction that the enforcement efforts of the United States would be far more effective and efficient were they concentrated in a single agency.

In his transmittal memorandum, the President of the United States observed:

> Seeking ways to intensify our counter-offensive against this menace, I am asking the Congress today to join with this Administration in strengthening and streamlining the Federal drug law enforcement effort.
>
> . . . .
>
> The enforcement work could benefit significantly, however, from consolidation of our anti-drug forces under a single unified command. Right now the Federal Government is fighting the war on drug abuse under a distinct handicap, for its

> efforts are those of a loosely confederated alliance. . . .
>
> More specifically, the drug law enforcement activities of the United States are not merely in two hands but in half a dozen . . .The Treasury Department is also heavily engaged in enforcement work through the Bureau of Customs.
>
> . . . .
>
> I therefore propose creation of a single, comprehensive Federal agency within the Department of Justice to lead the war against illicit drug traffic.

This was clearly the understanding of the Congress, see, e. g., 119 Cong. Rec. 18465, **et seq.** (1973).

A secondary reason for the Reorganization Plan No. 2 of 1973 was the need to end an apparently bitter inter-agency rivalry that was actually hampering federal law enforcement efforts. Congressman Horton, speaking on behalf of the Reorganization Plan when it was being debated in the House of Representatives, discussed what he termed "the unhealthy rivalry" between the Bureau of Narcotics and Dangerous Drugs and Customs, 119 Cong. Rec. 18467 (1973). Horton told his colleagues: ". . .we cannot afford any longer the senseless rivalry and duplication between Customs and BNDD," 119 Cong. Rec. 18468 (1973). The record is replete with similar expressions of concern, see, e. g., 119 Cong. Rec. 18471 (1973) (remarks of Congressman Brasco), 119 Cong. Rec. 18472 (1973) (remarks of Congressman Robison).

The final method chosen to end the "senseless rivalry" existing between Customs and BNDD was to take Customs out of the drug law enforcement business. In this regard, the Presidential transmittal memorandum noted that:

> The Drug Enforcement Administration would carry out the following anti-drug functions, and would absorb the associated manpower and budgets:
>
> . . . .
>
> --Those functions of the Bureau of Customs pertaining to drug investigations and intelligence. . . .

Section 1 of the Reorganization Plan provides:

> There are hereby transferred from the Secretary of the Treasury, the Department of the Treasury, and any other officer or any agency of the Department of the Treasury, to the Attorney General all intelligence, investigative, and law enforcement functions, vested by law in the Secretary, the Department, officers or agencies which relate to the suppression of illicit traffic in narcotics, dangerous drugs, or marijuana. . . .

The remarks of the many Congressmen who addressed themselves to the wisdom of Reorganization Plan No. 2 likewise make it plain that it was the understanding of Congress that Reorganization Plan No. 2 stripped Customs of its responsibility and authority to enforce the drug laws of the United States, 119 Cong. Rec. 18465, **et seq.** (1973).

The cases cited by the United States in opposition to the defendant's motion, **United States v. Diezel**, 608 F.2d 204 (5th Cir. 1979), **United States v. Delgado**, 615 F.2d 294 (5th Cir. 1980), are inapplicable inasmuch as neither of the cases discuss the power of the agents of the Customs Service in light of Reorganization Plan No. 2. Furthermore, both such cases fall within the express "border exception" to the deprivation of power effectuated by Reorganization Plan No. 2. See also **United States v. Carter**, 592 F.2d 402 (7th Cir. 1979).

Despite the rather plain language of Reorganization Plan No. 2 of 1973, it is conceivable, as well as arguable, that while Congress intended to shift "primary responsibility" for drug enforcement to the Drug Enforcement Administration, it did not intend to deprive Customs of "secondary authority" so as to invalidate any searches thereafter performed. Such an argument would, however, undercut the clear Executive and Congressional mandate which sought to end inter-agency rivalry. Furthermore, such an argument would ignore the plain language of the reorganization plan, to say nothing of the purpose and effect of 5 U.S.C. §907(a). §907(a) clearly provides that when a reorganization plan transfers a statutory duty from one agency to another, the transferee agency assumes the duty while the transferor agency relinquishes any and all rights thereto.

In light of the above, the Court concludes that under the present set of facts, the Reorganization Plan No. 2 of 1973 deprives the agents of the Customs Bureau of any responsibility or authority for the enforcement of the drug laws of

the United States. The effect of Reorganization Plan No. 2 of 1973 is to amend 26 U.S.C. § 7607 to expect from its application the enforcement of said drug laws.

As a side note, the United States argues that Federal Rule of Criminal Procedure 41 provides authority for the search challenged herein. Subsection (h) of Rule 41 provides as follows:

> This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. . .The phrase "federal law enforcement officer" is used in this rule to mean any government agent. . .who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

The Court is of the opinion that Federal Rule of Criminal Procedure 41 is inapplicable to the case at bar. If Rule 41 were itself a grant of authority, there would be no purpose whatsoever for statutes such as 26 U.S.C. § 7607 or 16 U.S.C. § 1a-16. Since the Court is loathe to interpret any federal statute in such a manner as to render other federal statutes mere surplusage, the Court accordingly finds that Federal Rule of Criminal Procedure 41 implements the authority conferred by other sections, but does not in and of itself constitute a general grant of authority.

For all the reasons as stated herein, the Court grants the motion of defendant HARRINGTON for suppression of

all evidence and return of property. In this regard, all items seized from the defendant's home, not plainly contraband, are to be returned to the defendant forthwith.

IT IS SO ORDERED.

DATED: August 3, 1981.

RAUL A. RAMIREZ, JUDGE
UNITED STATES DISTRICT COURT

ORIGINAL FILED
OCT 23, 1981
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By_____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN J. HARRINGTON, et al.,

Defendants.

No. CR.S-80-157 RAR

MEMORANDUM AND ORDER

On August 3, 1981, this Court issued its Order granting the defendant's motion to supress certain items seized from the defendant's home during the execution of a search warrant. The Court found that the individual who applied for and executed the warrant, an officer of the Customs Bureau, was without any authority to do so, and that therefore the search and its fruits were not admissible against the defendant.

On August 14, 1981, the government requested that the Court reconsider its Order of August 3, 1981. The Court granted the motion and ordered the parties to brief the various points raised in the government's motion for reconsideration.

On September 16, 1981, the matter once again came on regularly for hearing. Alan M. May, Esq., appeared on behalf of the defendant, and Assistant United States Attorney Thomas T. Couris and Steven L. Basha, Esq., Office of the Chief Counsel, United States Custom Service, appeared on behalf of the government. The Court having considered the arguments of counsel, as well as the memoranda of points and authorities submitted by the respective parties and the **amicae curia**, now renders the following decision:

I

The government first asserts that a construction of the Reorganization Plan No. 2 of 1973 and a determination of the Plan's impact on 26 U.S.C. §7607 are unnecessary to sustain the search challenged by the defendant, because the Currency and foreign Transaction Reporting Act, 31 U.S.C. §1101, **et seq.**, provides complete authority for the search.

The government bases this argument on 31 U.S.C. §1105, which provides in relevant part as follows:

> (a) If the Secretary [of the Treasury] has reason to believe that monetary instruments are

> in the process of transportation and with respect to which a report required under § 1101 of this title has not been filed. . . he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:. . . .

The government urges the Court to find that since the search warrant was issued, **inter alia**, upon the authority granted by §1105, the application for and subsequent execution of the warrant was invulnerable to attack.

The defect in the government's argument is that the Court is unable to conclude that the warrant was issued with any consideration of **the Currency and Foreign Transaction Reporting Act**. While it is true that the affidavit in support of the application for the search warrant makes a fleeting reference to the Act, it is likewise true the affiant has probable cause to believe that the individuals listed in the affidavit have violated 31 U.S.C. §1101. In addition, the affiant points to no specific, articulable facts from which a neutral and detached magistrate could conclude that the defendant intended to, or was in the process of, violating the Act. Viewed in the light most favorable to the government, and considering the other affidavits that were incorporated by reference, the facts as alleged by the affiant show that while the defendant may have been a distributor of the **imported marijuana for the other defendants, he was not a part of the importation enterprise.**

These facts, therefore, cannot give rise to a finding of probable cause to believe **the defendant was committing currency violations.**

It is hornbook law that an affidavit to issue a search warrant must contain sufficient information for a neutral and detached magistrate to determine that probable cause exists to believe that contraband or evidence of criminal activity will be found in the place to be searched. **United States v. Harris**, 403 U.S. 573, 91 S.Ct. 2075 (1971), **Spinelli v. United States**, 393 U.S. 410, 89 S.Ct. 584 (1969), **United States v. Ventresca**, 380 U.S. 102, 85 S.Ct. 741 (1965), **Aguilar v. Texas**, 378 U.S. 108, 84 S.Ct. 1509 (1964). In the present case, the affidavit proffered in support of the search warrant contained no information whatsoever upon which a neutral and detached magistrate could conclude that probable cause existed to believe that the defendant was intending to commit or in the process of committing a violation of 31 U.S.C. §1101. Accordingly, the authority vested in the Customs officers by 31 U.S.C. §1105 can have no relevance to the instant search.

At oral argument, the government tendered an additional argument based on the authority granted Customs officers pursuant to 31 U.S.C. §1105. The government contended that, notwithstanding the total want of probable cause to believe that the defendant was in the process of committing a violation of §1101, Title 31 U.S.C. §1059[1]

1. 31 U.S.C. § 1059 provides as follows:

Whoever wilfully violates any provision of this chapter where the violation is -

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period.

shall be fined not more that $500,000 or imprisoned not more than five years, or both.

authorizes the invocation of the search authority granted pursuant to §1105 in the investigation of other crimes. For the reasons as set forth herein, this contention must be rejected.

First, §1059 is merely a penalty-enhancement statute; it does not confer investigatory jurisdiction. Second, interpretation of Title 31's various provisions in the manner urged by the government would make a nullity of all other provisions of federal law which assign Customs officers various duties and limit their power and authority in the performance of those duties. Third, as many courts have observed, Customs officers are not "general guardians of the public peace." **United States v. Diamond**, 471 F.2d 771 (9th Cir. 1973), **United States v. Diezel**, 608 F.2d 204 (5th Cir. 1979). Most federal crimes involve money, its acquisition, transportation, and distribution. Under the interpretation of §1059 tendered by the government, commission of any crime involving money could trigger the investigatory authority of the Customs officers, and Customs officers would indeed become "general guardians of the public peace." The concept that the Customs officers have a special mission, along with special powers, see **United States v. Soto-Soto**, 598 F.2d 545 (9th Cir. 1979), would be rendered meaningless.

Accordingly, the Court concludes that the authority vested in the officers of the Customs Service by 31 U.S.C. §1105 has no application to the search challenged herein.

II

The government next asserts that the Court was in error when it concluded that the Reorganization Plan No. 2 of 1973, 87 Stat. 1091, 1973 U.S. Code, Cong. & Admin. News 3554, stripped the Customs officers of their general drug-enforcement authority. In large measure, the government's argument consists of urging the Court to read the language of the Reorganization Plan on a piecemeal basis, giving greater emphasis to certain words in the Presidential Transmittal Memorandum. The government suggests that from these carefully selected bits of language, one can "glean" an Executive intent to give primary authority to the Drug Enforcement Administration while leaving secondary authority in other federal agencies.

The Court, in its Order of August 3, 1981, acknowledged the existence of this argument. The Court then, as now, found it to be wholly unpersuasive. An interpretation of the Reorganization Plan in the manner urged by the government would not only do violence to the plain language of the Plan itself but also to the policy of said Plan. In this regard, § 1 of the Reorganization Plan provides:

> There are hereby transferred from the Secretary of the Treasury, the Department of the

> Treasury, and any other officer or any agency of the Department of the Treasury, to the Attorney General **all** intelligence, investigative, and law enforcement functions, vested by law in the Secretary, the Department, officers or agencies which relate to the suppression of **illicit traffic in narcotics, dangerous drugs, or marijuana. . .**(emphasis added)

One would be hard-pressed to draft plainer language than that used in § 1 of the Reorganization Plan. Once **all** intelligence, investigative, and law enforcement functions had been transferred from the Secretary of the Treasury to the Attorney General, Treasury had **no** such functions to perform. For this reason, this Court finds itself unable and unwilling to read the quoted language to mean less than it clearly says.

The reading urged by the government would render meaningless the narrow, explicit exception created by § 1 of the Reorganization Plan. § 1 explicitly provides that Customs shall continue to have investigative authority ". . .at the ports of entry or anywhere along the land or water borders of the United States. . . ." If Customs, despite the enactment of the Reorganization Plan,[2] had continuing

2. A Reorganization Plan does not become law by the affirmative act of Congress. Pursuant to 5 U.S.C. § 906, a Reorganization Plan becomes law if neither House disapproves it within 60 days of its submission to Congress by the President.

authority to engage in general drug-enforcement activities, that exception would be irrelevant and mere surplusage. The Court is unable and unwilling to conclude that the President meant absolutely nothing by the language of § 1.[3]

Further, the plain language of 5 U.S.C. §907, discussed in greater detail, **infra**, undercuts the government's primary-secondary argument. § 907 provides that when a reorganization plan reassigns a function vested by statute "the function . . .shall be deemed as vested in the agency under which the function is placed by the plan." It is impossible to read §907 as leaving responsibility for the discharge of the function in the agency to whom it was originally assigned.

The weightier argument proferred by the government is that the Court's interpretation of the Reorganization Plan constitutes an implied repeal of 26 U.S.C. § 7607, and, of course, implied repeals are strongly disfavored. The Court, however, finds that in making this argument the government misconstrues 5 U.S.C. §907. Title 5, U.S.C. §907 provides in pertinent part as follows:

> (a) A statute enacted. . .or a function affected by a reorganization under this chapter. . .has. .

3. The government's reliance on **United States v. Diezel**, 608 F.2d 204 (5th Cir. 1979) is misplaced. First, the Court did not address the application of the Reorganization Plan to 26 U.S.C. §7607. Second, the search in that case fell clearly within the explicit exception of § 1 of the Reorganization Plan since the search was conducted at a water border of the United States.

.the same effect as if the reorganization had not been made. However, if the statute . . .has vested the functions in the agency from which it was removed under the reorganization, the function. . .shall be deemed as vested in the agency under which the function is placed by the plan.

Thus the President's decision to remove a function from one agency and confide the responsibility for the discharge of that function in another agency is not a repeal, implied or otherwise, of the statute vesting the function in the first agency.

The effect of § 907 is to transfer all of the drug enforcement functions and authority from the Customs Service to the Drug Enforcement Administration, in conformance with the Reorganization Plan. Specifically, § 1 of the Reorganization Plan transferred "...all intelligence, investigative, and law enforcement **functions** . . .which relate to the suppression of illicit traffic in narcotics. . ." from the Department of the Treasury to the Department of Justice. (emphasis supplied) Title 5, U.S.C. §907 provides that when a **function** is transferred from one agency to another, the statute remains in full force and effect, but the substituted agency exercises the authority granted by the statute. Thus a construction of the Reorganization Plan No. 2 of 1973 as a transfer of functions from the Department of the Treasury to the Department of Justice does not constitute an implied repeal of 26 U.S.C. §7607.

For all the reasons discussed herein, the court does not construe the Reorganization Plan No. 2 of 1973 as leaving secondary authority in the officers of the Customs Service.

III

Having disposed of two of the government's preliminary contentions, the Court is now required to reach the more

difficult issue raised by the government's motion to reconsider: does the total want of statutory authority for the application and execution of the search warrant necessitate the invocation of the exclusionary rule?

The government has cited the Court to a long line of cases which hold that technical violations of Rule 41 of the Federal Rules of Criminal Procedure do not warrant the invocation of the exclusionary rule. While the Court concedes the validity and wisdom of the holdings of those cases, the Court finds them unhelpful to the question posed by the case at bar. **Indeed, insofar as the Court can determine from the record, the application for and execution of the warrant was technically perfect.** The issue here, however, is whether the application for and execution of the search warrant by a **law enforcement officer without the authority to do so is a "mere" technical violation?**

The Court is aware of the case of **United States v. Pennington**, 635 F.2d 1387 (**10th Cir. 1980**), which bears on this question. In **Pennington**, the United States Magistrate issued a warrant to an Oklahoma state officer authorized under Oklahoma law to conduct searches and enforce the drug laws of the State of Oklahoma. The search was conducted exclusively by Oklahoma state officers, and thus that provision of Federal Rule of Criminal Procedure 41 (c) which requires that "The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States" was violated. The defendant was prosecuted in federal court for

a violation of 21 U.S.C. § 841(a)(1) and 846.

The Tenth Circuit, over one dissent, held that the deviation from the requirements of Rule 41(c) did not warrant the application of the exclusionary rule. In holding that the exclusionary rule should be applied circumspectly to situations where there is no constitutional violation, the court found that since it had not been shown that the search would not have occurred but for the violation of the rule or would have occurred in a less abrasive manner, and since it had not been shown that the disregard of the rule was **deliberate or intentional**, the exclusionary rule would not be invoked.

Although **Pennington** is instructive on the issue, it is not on all fours with the instant case. The court in **Pennington** carefully noted that the Oklahoma officer who applied for and executed the warrant was authorized under Oklahoma law to apply for and execute warrants and to enforce the drug laws. Therefore, the **Pennington** case does not involve the situation where the law enforcement officer has no authorization under any law to conduct the search and in fact has specifically had said authorization taken away by direct action of the President of the United States.

Furthermore, the decision of the Ninth Circuit in **United States v. Soto-Soto**, 598 F.2d 545 (9th Cir. 1979) would seem to be contrary to the **Pennington** decision. **Soto-Soto** did not involve the application for and execution of a search warrant, but it did involve a federal law enforcement officer acting beyond the scope of his

statutory authority. In **Soto-Soto**, an agent of the Federal Bureau of Investigation was conducting an investigation into the international theft of stolen vehicles at the United States-Mexican border. In the course of that investigation, but without a "founded suspicion" to believe that the driver had violated any law, the FBI agent stopped the driver of a 1976 Chevrolet pickup truck and without the consent of the driver opened the hood of the truck and discovered marijuana.

The district court granted the defendant's motion to suppress, holding that since there was no "founded suspicion" for the stop, it could not be justified as conventional law enforcement activity. The district court further held that since the search was not done with the participation of or coordination with the Customs Service, it could not be justified as a border search.

The Ninth Circuit affirmed the decision of the district court explaining that the rights of the individual, **vis-a-vis** the sovereign, are significantly reduced at the border. In holding that the sovereign has delegated its broad powers to search those who would enter the United States to the Customs Service, the Ninth Circuit found that the FBI agent who conducted the search did not have statutory authority to do so and, further, that the search conducted was not a search to enforce the importation laws. The Ninth Circuit concluded that the search was invalid.

The government emphasizes that in **Soto-Soto** the FBI agent who conducted the search did not have probable cause to stop the truck and, as such, the absence of

probable cause was the sole and determining factor in regard to the search at issue. The government contrasts that situation with the instant situation, where, as the Court has already determined, there was probable cause to believe that fruits and evidence of participation in a drug-distribution enterprise would be found in the place to be searched.

The government is absolutely correct that the lack of probable cause was the sole and determining issue insofar as it concerned an FBI investigation into the international theft of motor vehicles, 18 U.S.C. §§2311-2313, 28 U.S.C. §531, **et seq.** Once having determined, however, that the search could not withstand that scrutiny, the Ninth Circuit was compelled to determine whether the search could be justified as a "border search." Justification as a "border search" was impossible because (10 it was not undertaken to enforce the immigration laws, **and** (2) was conducted by an FBI agent rather than a Customs officer.

In **Soto-Soto** the Ninth Circuit decided that one federal law enforcement officer may not use the statutory authority given by Congress to another federal law enforcement agency, and that the evidence acquired by a search conducted without any statutory authority must be excluded from the trial. The Ninth Circuit held:

> Here the FBI agent's action violated federal statutes. He ignored the divisions of authority which Congress carefully legislated. As in **Miller** [**v. United States**, 357 U.S. 301, 78 S.Ct. 1190

(1958)], the exclusionary rule is applicable.

In reading **Soto-Soto**, it is apparent that the Ninth Circuit felt that a very important policy would be served by the application of the exclusionary rule to a search conducted by an officer without the statutory authority to do so: it would deter individual officers from ignoring the delegations of authority painstakingly created by Congress.

The value that the Ninth Circuit identified in **Soto-Soto** is well illustrated by the instant case. The legislative history of the Reorganization Plan makes it clear that Congress thought long and hard about the wisdom of taking Customs out of the drug-enforcement business, **see** 119 Cong. Rec. 18465, **et seq.** It appears, however, that all of the deliberations of Congress were for naught, because the attorneys for the government have indicated that the Customs Service has instructed its officers that the Reorganization Plan No. 2 of 1973 has had no effect on the authority and powers of the Customs Service. Statutory law is currently being, and has been for the past eight years, disregarded. "Exclusion of the evidence seized is the only effective deterrent of such disregard." **United States v. Soto-Soto, id.** at 550.

Thus this Court concludes that under **United States v. Soto-Soto** the evidence procured as a result of the search must be excluded.

The government also argues that whatever relevance **Soto-Soto** may have been when it was decided, it has been overruled, albeit **sub silentio**, by **United States v. Payner**, 100 S.Ct. 2439 (1980). In **United States v.**

Payner federal law enforcement officers engaged in flagrantly criminal conduct that admittedly deprived someone other than the defendant of his fundamental constitutional rights. The United States Supreme Court reiterated its earlier standing rule, holding that since the flagrantly criminal conduct did not violate the defendant's own constitutional rights, the defendant had no standing to complain of the conduct. The Supreme Court went on to hold that the inherent supervisorial power of the Court ought not to be invoked to exclude evidence in any situation where the Fourth Amendment would not give rise to exclusion:

> We conclude that the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully **from a third party not before the court**. Our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence **at the instance of a party who was not the victim of the challenged practices**. (emphasis supplied)

United States v. Payner, 100 S.Ct. at 2446. The government argues that **United States v. Payner** stands for the proposition that a violation of the law that does not rise to a violation of a constitutional right may not justify the invocation of the exclusionary rule. This Court cannot read **United States v. Payner**, a standing case, so broadly.

In **Miller v. United States**, 357 U.S. 301, 78 S.Ct.

1190 (1958), relied upon by the Ninth Circuit in **United States v. Soto-Soto**, the United States Supreme Court held that violation of federal law does warrant the invocation of the exclusionary rule. The decision in **United States v. Payner** did not purport to overrule the decision in **Miller v. United States**, and, in fact, the continuing validity of **Miller v. United States** was noted in **United States v. Caceres**, 99 S.Ct. 1465 (1979). Thus this Court concludes that **United States v. Payner** had not, **sub silentio** or otherwise, overruled **United States v. Soto-Soto**.

Additionally, of course, this Court feels constrained to decline the invitation to disregard Ninth Circuit precedent apparently on point. Without an explicit statement to the contrary from either the Ninth Circuit or the United States Supreme Court, this Court feels bound by **United States v. Soto-Soto**.

For all of the reasons discussed herein, the motion of defendant HARRINGTON to suppress all goods seized from his home is again granted.[4] All items seized from the defendant not plainly contraband shall be returned to the defendant within seven (7) days of the date of this Order unless the government files a notice of appeal within that period, in which case the Order of Delivery is stayed pending appeal.

4. See **United States v. Harrington**, 520 F.Supp. 93 (E. D. CA. 1981).

IT IS SO ORDERED.
DATED: October 22, 1981.

RAUL A. RAMIREZ, JUDGE
UNITED STATES DISTRICT COURT

FILED
Jul 15 1982
PHILLIP F. WINBERRY
CLERK, U.S. DISTRICT COURT
No. 81-1672
DC No. S-80-157
OPINION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

JOHN J. HARRINGTON,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of California
Raul A. Ramirez, District Judge, Presiding
Argued and Submitted May 12, 1982

Before: CHOY, HUG and Nelson, Circuit Judges
CHOY, Circuit Judge:

The district court suppressed evidence on which the Government relied. Because there was no adequate reason to apply the exclusionary rule, we reverse and remand with instruction for the district court to admit the evidence.

I

During an investigation of a large, drug-smuggling conspiracy, officers of the Customs Service conducted a warrant-authorized search of Harrington's residence in Del Mar, California. They seized a variety of drugs, $100,000 in currency, and other items that implicated him as a dealer of smuggled drugs. It is undisputed that the procedure used to obtain the search warrant complied fully with Fed. R. Crim. P. 41, and that the search complied fully with the warrant and the fourth amendment. Indeed, the district court found that "the application for and execution of the warrant was technically perfect." **United States v. Harrington**, 524 F. Supp. 292, 296 (E.D. Cal. 1981) (on reconsideration of earlier order to suppress reported at 520 F. Supp. 93).

The only reason given for suppressing the evidence was that under an Executive Reorganization Plan, the customs officers should not have conducted the investigation that led to the search and seizure. The Plan consolidated in the Drug Enforcement Administration (DEA) all responsibility for investigations of federal drug-law violations except when conducted "at regular inspection locations at ports of entry or anywhere along the land or water borders of the United States." Reorg. Plan No. 2 of 1973, 3A C.F.R. 263, 264 (1973), **reprinted in** 87 Stat. 1091 (1973), **amended by** Act of Mar. 16, 1974, Pub. L. No. 95-253, 88 Stat. 50.[1] Its purpose was to make the enforcement of federal drug laws more efficient. **See** President's Message to Congress

Transmitting Reorganization Plan, 1973 U.S. Code Cong. & Ad. News 3554.

In order to deter the Customs Service from usurping authority reserved for the DEA, the district court thought it necessary to suppress evidence produced by an investigation not in compliance with the Reorganization Plan. Nothing in the Plan or its history suggests that the President or Congress favored the use of the exclusionary rule to deter noncompliance. Rather, the district court based its decision on **United States v. Soto-Soto**, 598 F.2d 545 (9th Cir. 1979).

II

In **Soto-Soto**, we approved the suppression of evidence seized during a warrantless border search done by an FBI agent looking for stolen pickup trucks. The Government's contention, which we rejected, was that 19 U.S.C. § 482 exempted every search at the border from the warrant requirement. § 482 actually applies only when "officers or persons authorized to board or search vessels" are enforcing customs or immigration laws.[2] **See Klein v. United States**, 472 F.2d 847, 849 (9th Cir. 1973); **Alexander v. United States**, 362 F.2d 379, 382 (9th Cir.), **cert. denied**, 385 U.S. 977 (1966). The border search in **Soto-Soto** was therefore conducted by an unauthorized person (there was no claim that the FBI agent could board or search vessels) and for an unauthorized purpose (the

FBI agent was engaged in general law enforcement). In explaining the use of the exclusionary rule, we noted: "Statutory law was disregarded. Exclusion of the evidence seized is the only available effective deterrent of such disregard." **Soto-Soto**, 598 F.2d at 550.

Although this language seems expansive, it must be understood as part of our constitutional analysis in **Soto-Soto**. Border searches raise an unusual constitutional dilemma:

> There is the interest of the federal government in regulating and protecting its borders. There is also the interest of the defendant in the constitutional guarantee to protection from unreasonable search and seizure under the Fourth Amendment. These interests require careful balancing.

Id. at 548. In striking the balance, we have in effect held that Congress may declare certain searches normally violative of the fourth amendment to be constitutional when conducted at the borders. **See, e. g., Alexander**, 362 F.2d at 381-82. Because this creates an exception to standard constitutional practices, we enforce its limitations with great care. **See Soto-Soto**, 598 F.2d at 548. A warrantless border search by an FBI agent for general law-enforcement purposes falls outside §482. And when measured against normal fourth amendment standards, the search in **Soto-Soto** was patently unreasonable. **Id.** at 549. We approved the suppression of the evidence seized not merely because the search violated a statute, but because the statutory violation undermined constitutional

protections. The holding and the discussion of the exclusionary rule in **Soto-Soto** thus hinge on the border-search context; they do not apply in general or to the case before us.

III

The Government urges us to hold that **United States v. Payner**, 447 U.S. 727 (1980), implicitly overruled **Soto-Soto**. In **Payner**, the Supreme Court "reaffirmed the established rule that a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search and seizure violated the defendant's own constitutional rights." **Id.** at 731 (citations omitted).

But, as the foregoing discussion shows, **Soto-Soto** involved an unconstitutional search. We have previously so read **Soto-Soto**. Both **United States v. Vassar**, 648 F.2d 507, 511 n. 3 (9th Cir. 1980), **cert. denied**, 450 U.S. 928 (1981), and **United States v. Johnson**, 641 F.2d 652, 659 n.5 (9th Cir. 1980), contain footnotes stating: "In **Soto-Soto**, it was necessarily found that a violation occurred because a border search not conducted by a customs or immigration officer is, by definition, "unreasonable."' The word "unreasonable" harks back clearly to the fourth amendment prohibition against "unreasonable searches and seizures." Notwithstanding language in **Soto-Soto** apparently reserving judgment on whether the search intruded into the accused's right to privacy, **Soto-Soto**, 598 F.2d at 550, the opinion leads logically to the conclusion that the search was unconstitutional.

We therefore must wait for another day to decide whether after **Payner** the exclusionary rule can ever apply absent some constitutional violation. The Seventh Circuit Court of Appeals believes it can. **United States v. Cortina**, 630 F.2d 1207, 1214-17 (7th Cir. 1980). We express no opinion on the matter at this time.

IV

We hold only that a court should not automatically suppress evidence seized by an officer who, for some technical reason, should not have conducted the search. **Cf. United States v. Pennington**, 635 F.2d 1387, 1390 (10th Cir. 1980) (refusing to suppress evidence seized by a state officer not authorized by Fed. R. Crim. P. 41 to obtain or execute a federal warrant), **cert. denied**, 451 U.S. 938 (1981); **United States v. Burke**, 517 F.2d 377, 386-87 (2d Cir. 1975) (same). There must be an exceptional reason, typically the protection of a constitutional right, to invoke the exclusionary rule. We can find no exceptional reason here.

REVERSED and REMANDED.

FOOTNOTES:

1. While the Reorganization Plan vests in the DEA exclusive responsibility for inland drug investigations, the Attorney General may request the assistance of other agencies to help enforce federal drug laws. **See** 21 U.S.C. § 873(b); Exec. Order No. 11727, 38 Fed. Reg. § 18357 (1973). The parties debate vigorously whether in this instance the Attorney General, acting through his subordinates, solicited help from Customs. The district court did not resolve this factual dispute, and the record is not sufficiently clear for us to resolve it independently.

2. Section 482 provides:

Any of the officers or persons authorized to board or search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

FILED
SEP 7, 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-1672
DC No. S-80-157
ORDER

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

JOHN J. HARRINGTON,

Defendant-Appellee.

Before: CHOY, HUG and NELSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. FED.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

LODGED
DEC 10, 1982

CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
By_____
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CR S-80-157-RAR

ORDER

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN J. HARRINGTON, et al.,

Defendants.

This matter having come before the court for hearing on November 17, 1982, ALAN M. MAY appearing with and on behalf of the Defendant, JOHN J. HARRINGTON, STEVEN L. BASHA appearing for the Government, the matter having been argued and submitted by Counsel in open court.

IT IS HEREBY THE FINDING OF THE COURT,

1. That neither the District Court nor the Court of Apeals have made a finding of fact as to

whether or not the United States Customs Service in violating Rule 41 of the Federal Rules of Criminal Procedure did so intentionally and deliberately, the Defendant is therefore still entitled to assert that as a ground in a Motion to Suppress the Evidence obtained as a result of the search of his house on October 16, 1980, and;

2. That the Defendant does not have standing to raise issues with regards to the telephone wiretaps in this case.

IT IS THEREFORE ORDERED BY THE COURT, that the Motion by Defendant for an evidentiary hearing with regard to his Motion to Suppress, on the grounds that the violation of Rule 41 of the Federal Rules of Criminal Procedure was deliberate is hereby granted and said hearing shall be held at 9:00 a.m., January 4, 1983, in this Court.

IT IS FURTHER ORDERED BY THE COURT, that the Motion by Defendant for an evidentiary hearing and his Motion to Suppress based on the wiretaps, and Affidavits therefore, are denied.

DATED: December 6, 1982

HONORABLE RAUL A. RAMIREZ
United States District Judge

LODGED
DEC 18 1982
CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
Criminal Case No. 80-157 RAR
SUBSTITUTION OF ATTORNEY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES FREDERICK SCOTT, aka
Charles Gary Davis,

Defendant.

Defendant, Charles Frederick Scott, aka Charles Gary Davis, hereby substitutes Michael D. Stein of 1140 Union Street, Suite 101, San Diego, California, 92101, as attorney of record in place and stead of Joseph Milchen of 225 Broadway, Suite 1755, San Diego, California, 92101.
DATED: November 23, 1982

_____

CHARLES FREDERICK SCOTT

I consent to the above substitution.
DATED: November 24, 1982.

MICHAEL D. STEIN

Above substitution accepted.
DATED: November 24, 1982

JOSEPH MILCHEN

SUBSTITUTION. . .

FILED
AUG 9, 1984
PHILLIP B. WINBERRY
CLERK, U. S. COURT OF APPEALS

No. 83-1275
D. C. No. CR-S-8[illegible]57-17

MEMORANDUM*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHN J. HARRINGTON, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Raul A. Ramirez, District Judge, Presiding
Argued and Submitted June 13, 1984
Before: HUG, TANG and FARRIS, Circuit Judges.

John Harrington appeals his conviction for conspiracy to import hashish in violation of 21 U.S.C. §841(a)(1) and 952(a). He contends that the district court erred by failing to suppress evidence and by admitting the testimony of a co-conspirator who had become a government witness.

* The panel has concluded that the issues presented by this appeal do not meet the standards set for Rule 21 of the rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the **Federal Reporter**, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

Harrington argues that the search of his home by customs agents was illegal. The contention that the search was beyond the authority of the customs agents because it violated an Executive Reorganization Plan has previously been rejected. **United States v. Harrington**, 681 F.2d 612 (9th Cir. 1982). Harrington next contends that the district court improperly concluded that he lacked a privacy expectation sufficient to challenge wiretap affidavits incorporated into the search warrant for his home. This contention fails since he has no standing to challenge the legality of the wiretaps themselves because he was neither a party to an intercepted communication nor a person against whom the wiretap was directed. **Alderman v. United States**, 394, U.S. 165, 176 (1969); **Light v. United States**, 529 F.2d 94 (9th Cir. 1976).

Harrington also contends that the district court erred by admitting the testimony of a co-conspirator who had turned government witness. First, Harrington argues that the government's release of $20,000 to the witness constituted suborning perjury. However, he fails to identify any examples of false testimony that were allegedly provided. He further contends, however, that the witness' testimony should have been excluded because the government interfered with his attorney-client relationship. Because Harrington and the witness were represented at the beginning of the case by the same attorney, Harrington argues that the government's delay of a year in notifying him that the co-conspirator had been secured as a government witness effectively provided the government with access

to privileged communications between Harrington and his attorney. We find this contention unpersuasive. First, the attorney's concurrent representation of Harrington and the witness ceased several month prior to the witness' decision to turn government withess. Hence, the government was under no obligation to notify Harrington of the witness' decision. Second, Harrington fails to show how he was prejudiced by the alleged interference with his attorney-client relationship. A governmental intrusion into the attorney-client relationship does not violate the sixth amendment absent a showing of prejudice. **United States v. Irwin**, 612 F.2d 1182, 1186-87 (9th Cir. 1980). Harrington's mere speculation that the witness testified as to privileged matters from joint meetings between the co-conspirators and their attorney is insufficient to demonstrate the requisite prejudice.

Finally, Harrington contends that a variance exists between the indictment, which charged Harrington with participation in a single conspiracy, and the proof at trial which Harrington argues proved the existence of multiple conspiracies between October 1978 and October 1980.

In determining whether the existence of a single conspiracy has been established, this court views the evidence in the light most favorable to the prosecution and determines whether any rational trier of fact could have found a single conspiracy beyond a reasonable doubt. **United States v. Arbelaez**, 719 F.2d 1453, 1457 (9th Cir. 1983). Factors relevant to the inquiry include "the nature of the

scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of times and goals." **Id.** at 1458 (quoting **United States v. Zemek**, 634 F.2d 1159, 1168 (9th Cir. 1980), **cert. denied**, 452 U.S. 905 (1981)). Our review of the record indicates that sufficient evidence exists to uphold the district court's conclusion that Harrington was involved in an ongoing, single conspiracy. The central figures in the operation, including Harrington, remained the same throughout the relevant period, and the nature of the scheme and the activities in furtherance of it were fairly consistent. The district court did not err in finding the existence of a single conspiracy.

The Judgment is AFFIRMED.

PROOF OF SERVICE

STATE OF CALIFORNIA)

) ss:

COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate Street, Riverside, California 92509.

On December 21, 1984, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in a sealed envelope, and hand-delivering it to:

Assistant U.S. Attorney
Thomas T. Couris
3305 Federal Building
650 Capitol Mall
Sacramento, California

and three (3) true copies in a sealed envelope to:

United States Solicitor General
Dept. of Justice
Washington, D.C. 20530
Wade H. McCree

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on December 21, 1984 at Riverside, California.

_____

JACK GALLAGHER